1951.

File No. S. Bijapur 1/51

K

Examined

Legal DEPARTMENT

E BRANCH

Subject:— Suits : Bijapur.

In the Court of the Civil Judge (S.D.), Bijapur.

Civil Suit No. 224 of 1949.

Shree Gurappa Shivappa Koppad — — Plff.

Vs.

The State of Bombay — — Defts.

Re.- For (1) Declaration of illegality of the orders of the Revenue Authorities and (2) Injunction

Encl. (1)

File No. S. Bijapur 1/51.

Std. Sectt. Slip 24-B

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Sr.No.	R.I./O.No.	Subject	Pages.

Suits Bijapur.

C. S. No. 224 of 1949

Gurappa Shivappa Koppad

Vs.

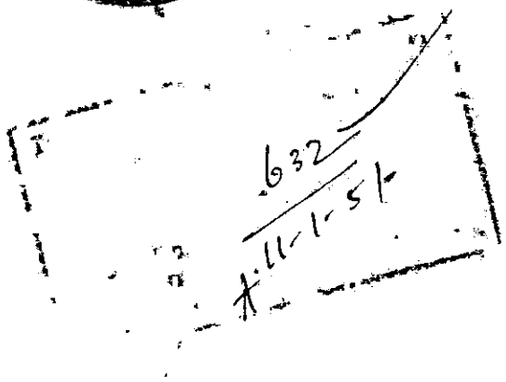
State of Bombay.

Re: For. 1) Declaration of illegality of the order of the Revenue Authorities and (2) Injunction.

1-114

Letter.

To



No.L.A.W. 199.
Bijapur, 7-1-1951.

The Remembrancer of Legal Affairs,
Bombay.

Sub : Civil Suit Nos. 198 & 199 of 1950 and 224 of 1949
Report under Rule 118 of Law Officers Rules.

Ref : Your letter No. 17909 dated 19-12-1950

C.S.Nos. 198 & 199.

I am to invite your attention to this office letter of even number dated 28-8-1950 and 14-11-1950 (copies enclosed) and to state that neither the notices under Sec. 80 Civil Procedure Code nor summons from the Civil Court have been served on the Collector. The Registrar, Co-op. Societies is the head of the Cooperative Department and the papers might be pending in his office. The report under Rule 118 in respect of C.S.Nos. 198 and 199 may be called for from him as already requested.

As regards report under Rule 118 of Law Officers Rules in respect of C.S.No. 224/49, the Bombay Revenue Tribunal has again been expedited by wire to send the papers immediately. On receipt of the papers from the Tribunal draft report will be submitted.

For Collector, Bijapur.

Submtd. for information.

As regards C.S. Nos. 198 & 199 of 1950 Rec'd
the Registrar Co-op. Soty. has sent the pps. to
the Development Deptt. (vide pps. put up below)

This may await the pps. in C.S No.
224/49

11-1

A Sols

11-1

Particulars of Civil Suits against Government pending in the Civil Court, Senior Division, Bijapur on 1-1-1951.

Serial No.	No. of suit and year of institution.	Date of institution.	Whether written-statement filed.	Stage at which pending.	Remarks.
1.	C.S.No.143/1949	23-3-1949	Filed.	For hearing on 19-1-1951.	
2.	C.S.No.192/1949	30-5-1949.	do	For hearing on 9-2-1951.	
3.	C.S.No.224/1949	30-5-1949.	Not yet filed.	For filing Written statement on 30-1-1951.	The defenee of this suit may be sanctioned very early.
4.	C.S.No. 2/1950.	5-1-1950.	Filed.	For hearing on 19-1-1951.	The original papers in this case are with the Collector. The plff has made an application to Collector to compromise the suit.
5.	C.S.No.690/1950.	10-6-1950.	Not yet filed.	For filing Written statement on 10-1-1951.	
6.	C.S.No.198/1950 C.S.No.199/1950	10-3-1950. 10-3-1950.	Not yet filed. do.	For filing Written statement on behalf of deft No.1 in both the suits on 25-1-1951.	
7.	C.S.No.301/1950.	18-4-1950.	do.	For filing Written statement on 1-2-1951.	
8.	C.S.No.967/1950.	21-11-1950.	do	For filing Written statement on 11-1-1950.	

No. 29 of 1951.
Date:-8-1-1951.

Respectfully submitted to the Remembrancer of Legal Affairs, Bombay.

District Government Pleader, Bijapur.

L. D. 12 JAN 1951

THE ... NT
... AL ...
File No 812
Date 13-1-51

812
13-1-51

Subject.

We have not received the bps. in two cases only. In the last case i.e. C.S. No. 967 of 1950 we are reminding the Coll. to-day by sending a monthly Return to him of December 1950. And in C.S. No. 224 of 1949 the Coll. of Bijapur reports that the bps. of the case are with the B.R.T. as the Petr. has appealed to B.R.T. The Coll. has reminded the B.R.T. President recently.

No action is necy. on this & may be filed in C.S. Returns/57

13-1

The Coll. shd. again be requested to get the papers from the B.R.T. 13-1.

In the Court of the Civil Judge, Bijapur

Civil Suit No. 224/49.

Gunappa Shivappa Koppad. . . . Plaintiff

Versus

The Province of Bombay . . . . Defendant.

The written statement of the deft. in this suit is as under :-

1) The deft ~~denies~~ denies the plff's claim or any part of it. This deft also denies all the allegations of fact made by the plff in this suit.

2) With reference to para 1 of the plaint, this deft denies the allegation that plff is the owner of the entire R.S. No. 84, measuring 7 A and 19 G situated at Yakkundi. This deft also denies the location and course of the Nalla as mentioned by the plff as well as the allegation that another water course joins this nalla in the plff's field. The nalla in question is one and the same and is of Govt. ownership. It flows by the side of the S. Nos. 84, 85, 82, 86 on the one side and S. Nos. 64, 65 on the other side and waters many other fields and flows throughout the year.

3) This deft denies the allegation made by the plff in para 1 of the plaint that the pavement constructed by the plff's father is of 75 years standing and is constructed without changing the natural course of the Nalla.

4) This deft does not admit the allegations of Collusion between the circle Inspector, and the Village Police Patel in the encroachment inquiry and the plff is put to the strict proof of the same.

5) The averments made by the plff in para 1 of the plaint that the Mamlatdar issued notice to the plff for removing the encroachment made by theplff under s. 202 of the Land Revenue Code and that the appeal filed by the plff was rejected summarily by the Collector, are correct and are not disputed by this deft.

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6) With regards the para 2 of the plaint, this deft denies the allegations that plff is the full owner of the bed of the nalla and that the plff has made no encroachment, and that the plff's father was justified in constructing the pavement and erecting the bund along the line indicated in the map drawn by the Circle Inspector.

7) This deft does not admit the allegation that the plff is legally entitled to bring under cultivation the bed of the Nalla.

8) This deft denies that plff has any cause of action for this suit and also the allegation that the cause of action arose on 14-8-48.

9) The notice under S. 80, Civil Procedure alleged to have been given by the plff is not legal and proper and so this suit is not maintainable.

10) With respect to para 7 of the plaint, this deft contends that the order passed by the Revenue authorities directing the plff to remove the encroachment is perfectly legal & valid and not ultra vires and void as alleged by the plff. The plff is, therefore, not entitled to the declaration and injunction claimed by him in para 7 of the plaint.

11) The suit is barred by Limitation under article 14 Schedule 1 to the Indian Limitation Act.

12) Even assuming that some portion of the Bed of the Nalla falls in the pot-Kharaba of S. No. 84, still the plff is not entitled to erect bund or construct pavement and change the course of Nalla so as to bring the dried up bed under cultivation. It is still an encroachment. The Mamlatdar with the previous sanction of the District Deputy Collector, was justified in issuing an order for removal of the encroachment under s. 48(4) and S. 61 of the Land Revenue Code read with Rule 75 of the Land Revenue Rules.

15) The alleged Pot-Kharab classified as "B" in the Govt. Record of S. No. 84 consists of Road and Stream used by persons other than the holder of S. No. 84 for

for irrigation and other purposes. The piff is legally prohibited from cultivating the Pot Kharaba and the area covered by the Road and Stream or Nalla or change the course of Nalla so as to bring the bed under Cultivation. The order of the Revenue Officers is, therefore, legal and valid.

14) The piff's suit against Govt. ismisconceived. The remedy, if any, is against the holders of the neighbouring fields. The suit, is therefore, not maintainable.

15) The piff's description of the deft in the suit is contrary to the provisions of S. 79 Civil Procedure Code as amended by the adaptation of the Indian Laws Order, 1950. The suit as framed is, therefore, not maintainable.

For these reasons, the deft submits that the suit fails and should be dismissed with costs.

District Government Pleader,
Bijapur.

I, District Government Pleader, Bijapur do hereby declare that what is stated in paragraphs 1 to 15 above is true according to the information received and believed to be true.

This verification is made at on the day of A p r i l 1951.

District Government Pleader,
Bijapur.

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Bijapur Civil Suit No.224/1949.

This is a suit for a declaration that the order of the Revenue authorities, directing the plaintiff to remove the alleged encroachment is ultra vires and void and for an injunction.

2. The suit is defensible. The defence of the same may, therefore, be sanctioned on the lines of the accompanying brief.

3. The written statement in the case is already dispatched.

[signature]
12/4

Solicitor (M.L) corrections made. Please get it retyped
[signature] 13/4

Submitted, retyped.

[signature]
13/4

Solicitor (M.L) approved

[signature]
13/4.

[signature]

* Secy. R.D. [signature] 13/4

* No. 5992
dt 13-4-51

No. 6164

Office of the
Remembrancer of Legal Affairs,
Bombay Castle(Bombay No.1), 17th April 1951.

Subject: Bijapur Civil Suit No. 224/49

MEMORANDUM.

The District Government Pleader, Bijapur is informed that the defence of the suit noted above is sanctioned and he is requested to conduct the same on the lines of the brief, a typed copy of which together ~~with two copies of the Written Statement~~ is sent herewith in advance.

Papers of the case in files, Vols. (2) received from the Collector accompany.

For Remembrancer of Legal Affairs.

To

The District Government Pleader, Bijapur

KML/4

GR no 6406 dt 21-4-51.
Govt of India Press. dt 1-5-51.

Suits :

Bijapur.

For (1) Declaration of illegality of the order of the Revenue authorities and (2) Injunction.

GOVERNMENT OF BOMBAY.

LEGAL DEPARTMENT.

Resolution No. 6406.

Bombay Castle, 21st April 1951.

Letter from the Collector of Bijapur, No. L.A.W. 199, dated 22nd February 1951—Forwarding the papers in the suit noted in the margin and requesting sanction to its defence.

IN THE COURT OF THE CIVIL JUDGE (SENIOR DIVISION), BIJAPUR.

Civil Suit No. 224 of 1949.

Shree Gurappa Shivappa Koppad ... ... Plaintiff;

versus

The State of Bombay ... ... Defendant.

Memorandum to the District Government Pleader, Bijapur, No. 6164, dated 17th April 1951—Forwarding a copy of the brief with its accompaniments in advance.

RESOLUTION.—Sanction is accorded to the defence of the suit on the lines of the accompanying brief.

By order of the Governor of Bombay,

J. R. DHURANDHAR,
Secretary to Government.

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[P.T.O.

To

*The Revenue Department,
*The Collector of Bijapur,
The District Government Pleader, Bijapur (with two copies of the brief).

* With a copy of the brief.

No. of 1951.

Copy forwarded for information and guidance to

Submitted after issue
File in S. Bijapur/87 (Grew)
6/6
A Sons
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BIJAPUR CIVIL SUIT No. 224 OF 1949.

Chronological Statement of Facts.

This is a suit for a declaration that the order of the Revenue authorities, directing the plaintiff to remove the alleged encroachment is *ultra vires* and void and for an injunction restraining the defendant from removing the alleged encroachment.

2. One Hanmanbhat Joshi applied to the Mamlatdar of Bijapur on the 20th March 1943 complaining about the damage caused to his field Survey No. 64 due to the construction of pavement and erection of bund by the holder of Revision Survey No. 84 and praying for the removal of the said encroachment. The matter was sent to the Circle Inspector for inquiry and report. The Circle Inspector recorded the statements of the contending parties, prepared the map, and finally submitted the report. The Mamlatdar ordered the encroacher to remove the encroachment; but he refused. The papers were then submitted to the District Deputy Collector for sanctioning the proposal to issue notice to the encroacher under section 202 of the Land Revenue Code. On the 8th March 1948 the District Deputy Collector sanctioned the Mamlatdar's proposal.

3. On the 23rd March 1948 the Mamlatdar issued notice to the encroacher to remove the encroachment made by him under section 202 of the Land Revenue Code. The plaintiff filed an appeal to the Collector against the order of the Mamlatdar, but it was summarily rejected on the 23rd July 1948. The plaintiff then filed an appeal to the Commissioner which was forwarded to the Bombay Revenue Tribunal.

4. Pending the decision of the said Tribunal, on the 22nd February 1949 the plaintiff gave notice of suit under section 80 of the Civil Procedure Code, and he filed this suit in the Court of the Civil Judge, Senior Division, Bijapur.

Grounds of Defence.

1. *Title.*—The plaintiff's name is not shown as owner or Kabjedar of Survey No. 84 in the Record of Rights in the case. It stands in the name of Shivappa who is probably plaintiff's father. The plaintiff has no title to the suit property. He cannot therefore sue for declaration and injunction. His title to the suit property should be denied and he should be put to the strict proof of the same.

2. *Cause of action.*—As the plaintiff is not the owner of the suit property, he has no cause of action for this suit. This suit is therefore not maintainable.

3. *Merits.*—The main contention of the plaintiff in this suit is that the order of the Revenue authorities to remove the encroachment is *ultra vires* and void. The Mamlatdar of Bijapur with the previous sanction of the District Deputy Collector issued a notice under section 202 of the Land Revenue Code ordering the plaintiff to remove the encroachment made by him. The plaintiff appealed to the Collector, against the order of the Mamlatdar. The appeal was summarily rejected and the Collector also issued an order dated the 17th August 1948, calling on the plaintiff to remove the encroachment. It consists of construction of pavement along some portion of boundary line of Survey No. 84 and erection of bund, east-west so as to change the course of nalla or stream flowing by the side of Survey Nos. 84, 82, 85. It is an undisputed fact that the nalla, in question waters fields other than the plaintiff's and flows throughout the year. If this nalla is of Government ownership, the plaintiff has no case to complain and the Revenue authorities are competent to summarily deal with this encroachment under sections 48 and 61 of the Land Revenue Code. In that case, the notice issued by the Mamlatdar of Bijapur under section 202 of the Land Revenue Code for removal of the encroachment is legal and valid.

4. It is, however, contended by the plaintiff that the nalla in question does not water the Government fields nor is it of Government ownership. Besides, the area of the bed of this nalla is shown in Survey No. 84 as Pot Kharaba, and so the Government cannot challenge the plaintiff's right to bring the bed of nalla under cultivation. The alleged Pot Kharaba of Survey No. 84 is classified as 'B' in Government Records, consisting of 11 gunthas as road, 14 gunthas as nalla, and 17 gunthas as rock. Assuming that this nalla is not of Government ownership, it is still an encroachment if the Pot Kharaba classified as 'B' is diverted to any other purpose than that for which it was originally intended. This encroachment has the effect of endangering or flooding the neighbouring lands. Rule 75 of the Bombay Land Revenue Rules, expressly provide for cases of this type. The cultivation of class 'B' lands is expressly prohibited under section 48, sub-section (*4*), provided they fulfil the conditions mentioned in paragraph 1 of Rule 75, Land Revenue Rules. Both conditions are present in this case. The nalla irrigates lands other than the plaintiff's, and the Pot Kharaba includes land assigned for road and rock. The Pot Kharaba originally assigned for a specific purpose cannot be cultivated by the owner of Survey No. 84. If he does it, the Collector can summarily eject the encroacher and remove the encroachment under section 48 (*4*) read with section 61 of the Land Revenue Code as the unauthorised use amounts to an encroachment. So, the order of the Revenue Officers is legal, valid

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and *intra vires*. It cannot be questioned by the plaintiff or by the owner of Survey No. 84. The plaintiff's right to bring the Pot Kharaba under cultivation should be specifically denied.

5. The plaintiff's description of the defendant in the suit is contrary to the provisions of section 79, Civil Procedure Code, as amended by the Adaptation of Indian Laws Order, 1950. The suit as framed is, therefore, not maintainable.

6. *Limitation.*—The order removing the encroachment was issued on the 23rd March 1948. The date of institution of the suit is not clear from the Record. The District Government Pleader is requested to ascertain the date and raise this ground in case the suit is filed more than one year after the date of the order.

7. The map in this case is drawn by the Circle Inspector. The encroachment made by the owner of Survey No. 84 is shown in red therein. The plaintiff was asked to remove the encroachment but he refused. The Mamlatdar, with the previous sanction of the District Deputy Collector is justified in dealing with the encroachment summarily. Powers of the Collector to deal with encroachments have been delegated to the Mamlatdars under Government Resolution, Revenue Department, No. 1277/33, dated the 7th June 1934. Besides, the Collector has also issued an order dated the 17th August 1948 to remove the encroachment. The order of the Revenue officers is, therefore, legal, valid and *intra vires*.

8. The plaintiff's suit against Government is therefore misconceived. His remedy, if any, is against the holders of the neighbouring fields. In the absence of these holders, the plaintiff's suit is not maintainable.

9. For these reasons it should be contended that the suit fails and should be dismissed with costs.

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In the Court of the Civil Judge,Senior Division,Bijapur.

Civil Suit No.224 of 1949.

1. Gurappa Shivappa Koppad. plaintiff.

Vs.

1. The Province of Bombay. defendant.

Herein the defendant states that it is the case of the defendant that plaintiff's remedy if any is against the holders of the neighbouring lands and that in the absence of these holders as Parties in this suit the plaintiff's suit is not maintainable.

This contention of the defendant is set forth in Para 14 of the written-statement. While it is stated therein that this suit is not maintainable on the ground that Plaintiff's remedy if any is against the holders of the neighbouring fields it isnot clearly stated therein that in the absence of these holders this suit is not maintainable.

It is therefore submitted that at the end of Para 14 of the written-statement " in the absence of the holders of the neighbouring fields as Parties to this suit" be allowed to be added.

It is further submitted that with this amendment an issue " Whether this suit is maintainable in the absence of the holders of the neighbouring lands as Parties to this suit" be framed.

District Government Pleader, Bijapur.

I A.C.Angadi, B.A.LL.B., District Government Pleader Bijapur do hereby declare that what is stated above is true on information received and believed to be true.Signed in Bijapur on _____.

Government Pleader,Bijapur

2385

Civil Suit No. 224 of 1949.

In the Court of the Civil Judge, Sr.Dn.at Bijapur.

Ex. 40.

1. Guvappa Shivappa Koppad .... Plff.

vs.

1. The Province of Bombay. .... Deft.

Herein the plff begs to apply as follows:-

The plff has described the deft at the time of filing the suit as "The province of Bombay" but after filing the suit the provisions of Section 79 Civil Procedure Code have been amended by the adaptation of the Indian Laws order 1950 and the Government shall be described as the "State of Bombay". Hence the plff feels it necessary to amend the title column of the plaint. It is, therefore, requested that the description of the defendant given as "Province of Bombay" in the title column be deleted and in its place the following be added.

"The state of Bombay".

Bijapur. Sd/- Gurappa Shivappa Koppad
(In Kannad)

Date:- 16-11-1951.

Plaintiff.

I, Gurappa Shivappa Koppad of Yakkundi, the plff do hereby solembly declare that the contents of the above application are true to the best of my information and belief.

Sd/- Gurappa Shivappa Koppad.

Plaintiff.

Sd/- L.H.Joshi.

Pleader for plff.
16-11-1951.

Notice to deft.

Sd/- M.M.Nadakarni.

Civil Judge,S.D.

16-11-1951.

No. 1362 of 1953.
Office of the D.G.P.Bijapur.
19-10-1953.

To

The Collector of Bijapur.

Subject:- Proposal to prefer an appeal against the decree passed in Bijapur Civil Suit No.224 of 1949.

Sir,

In continuation of my No. 1371 of 16-10-1953 I have the honour to forward herewith uncertified copy of Judgment and some copies and translations. I recommend that Government may be moved to prefer an appeal in the Court of District Judge,Bijapur, against the decree in the above suit. The period of appeal for filing appeal is 30 days from 15-10-1953. I have applied for certified copy of Judgment and decree and I will obtain and keep them with me. In case the Government decides to prefer an appeal an intimation will be sent to me in time for prefering appeal in Bijapur District Court and in that case I will prefer the appeal and produce certified copies in Court. I have also sent herewith a draft of appeal memo for favour of being forwarded to the Remembrancer of Legal Affairs,Bombay, for favour of ~~sanction~~ scrutiny and revision.

25420
23/10/53

(2) The Suit land is S.No.84. The Record of Rights Extract (Ex.79) shows that it comprises cultivated area of 6 acres and 17 gunthas and Pot Kharab of 1 acre and 2 gunthas. The land thus measures 7 acres and 19 gunthas in all including Pot Kharab of one acre and 2 gunthas.

(b) Ex.73 is extract of Prati book of 1885 wherein the details of the Pot Kharab of this land are given and ~~prep~~ portion of it is on account of Nala.

(c) The village Map Ex. 92 shows that a Nala flows east-west from the eastern direction through many lands. It comes from afar and passes through S.No.84 and then passes through several lands on the western

side of the suit land. The bed of this nala especially its location in S.No. 84 is shown in the village Map Ex.92 prepared in the year 1886. Plff's hand sketch with the plaint also shows its location. I have attached copy of it to the village map.

(d) Ex.77 is the sketch drawn after measurements by the Cadestral Surveyor in the year 1946. That sketch shows in ~~read~~ red the bed of the Nala according to the village map. Ex.84 shows that that bed in red is Pot Kharab.

(e) The plaintiff brought under cultivation the bed of the Nala shown in red in Ex.77. The bed of the Nala in question is of class (b) as per Rule 75(1)(b) of the Land Revenue Rules (please vide also Ex.74 and Ex.91). The cultivation of such pot-kharab is prohibited under Rule 75(2) of the Land Revenue Rules. The Mamlatdar of Bijapur with the sanction of the District Deputy Collector issued notice Ex.71 to plaintiff under Sec.202 of the Land Revenue Code to give up the (cultivation of) ~~bed~~ bed of the Nala. The plaintiff preferred an appeal to the Collector which was dismissed (Ex.72). The order of the Collector was sent to the Mamlatdar by the Prant Officer for necessary action. The Mamlatdar then issued notice (vide below Ex.72) similar in substance to Ex.71. The plaintiff then filed this suit for declaring that the order of revenue authorities is ultravires and void and for an injunction restraining removal of the encroachments. The learned Judge, Senior Division, ought to have , in view of the evidence referred to above, held that the order of the Mamlatdar in issuing notices Exs. 71 and 72 is legal and intravires and ought to have dismissed the suit of the plaintiff.

For reasons stated above, and for reasons stated in the appeal memo herewith attached, I am of opinion that the findings of the lower Court on issues Nos. 3 to 7 and 9 are wrong and therefore an appeal ought to be preferred.

Yours faithfully,

A.C. Angadi.

District Government Pleader,

Bijapur.

9-4-27
15-11

No. 1383 of 1953.
19-10-1953.

Copy respectfully forwarded to the Remembrancer of Legal Affairs, Bombay, with uncertified copy of Judgment, copies and translations of Papers, and draft of memo of appeal.

A Ahmad

District Government Pleader, Bijapur.

Section Officer

An uncertified copy of
Judgment in C.S. No 244/49 decided
by Addl. Dist. Judge on 15.10.53 &
Memo of Appeals.

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Draft of Memo of appeal

In the Court of the District Judge at Bijapur.

Civil Appeal No. ____ 1953.

(1) The Bombay State .... Appellant(defendant).

Vs.

(1) Gurappa Shivappa Koppad age 55, agriculturist of Yekkundi in Bijapur Taluka. .... Respondent(plff).

Herein the appellant states as under:-

The respondent-plaintiff filed a Civil Suit No. 224 of 1949 against the appellant-defendant. The suit was heard by Civil Judge, Senior Division, Bijapur, who gave Judgment and passed a decree in favour of the respondent-plaintiff on 15-10-1953. Being aggrieved by the said Judgment and decree, the appellant-defendant prefers this appeal inter alia on the following grounds:-

(1) The finding of the lower Court on issue No.7 is erroneous and the lower Court ought to have held that the order of the Mamlatdar in question is intravires and legal.

(2) The lower Court ought to have held that the bed of the the Nala was as shown in red in the sketch Ex.77, that the Pot Kharab is of the class described in Rule 75(1)(b) of the Land Revenue Rules, that its cultivation by the plaintiff has been prohibited and that in view of Secs. 48, 61 and 121 of the Land Revenue Code the orders of the Revenue authorities and notices Ex.71 and 72 issued under Sec. 202 of the Land Revenue Code are perfectly legal and proper.

(3) The lower Court has not correctly taken into consideration what exactly the plff was called upon to do by the notices Exs. 71 and 72.

(4) The notice Ex.71 clearly mentions the area called

upon to be vacated, and the notice Ex.72 also is clear on the point. The lower Court erred in not taking into consideration correctly what the area called upon to be vacated was.

(5) The lower Court erred in not taking into consideration the fact that the notices issued were accordingix to the first part of Sec.202 of the Land Revenue Code and further proceedings of removal of the person refusing to vacate are subject to inquiry under the third part of that Section.

(6) The observations of the lower Court about plaintiff and his father not having ~~xxxxx~~ changed the course of the Nala and about the pavement and about putting of the embankment are erroneous.

(7) The lower Court erred in holding that the defendant did not prove that the red portion in Ex.77 fell within the area of the Pot Kharab of the Nala.

(8) The lower Court's observation that it is not known at whose costs the land was measured in the year 1946 is erroneous.

(9) The observations of the lower Court about the village officers are erroneous.

(10) The plaintiff had preferred an appeal to the Commissioner and it was in this proceeding that on being called upon by the higher authorities ~~that~~ ~~thxx~~ information contained in Ex. 74 was supplied. Pending decision of the appeal forwarded to the Bombay Revenue Tribunal, the plaintiff filed the suit and this point would have been made clear if the same were to have been asked to the defendant's pleader.

(11) The lower Court erred in holding from the condition of the Nala that it could hardly flow throughout the rainy season and that notice was issued without ascertaining the ~~notice~~ nature of the Pot Kharab and that information began to be collected to meet the plaintiff's case in the suit.

(12) The lower Court has not put correct interpretation as to

what the plaintiff was called upon to do by the notices (Exs.71 and 72).

(13) The lower Court erred in not holding that the Nala bed had been correctly ascertained by ~~the~~ measurement in the presence of the parties and had been shown in red in Ex.77.

(14) The decision and the Ruling relied upon by the lower Court do not apply to the facts of the case.

(15) The lower Court ought to have held that the Nala bed shown in red in the sketch Ex.77 is of class (b) Pot Kharab and is such as is referred to in Rule 75(1)b of the Land Revenue Rules.

(16) The lower Court ought to have disbelieved the plff and ought to have accepted the evidence of the defendant's witness Ex.91 and the other evidence adduced on behalf of the defendant.

(17) The lower Court ought to have held from the village map produced by the plaintiff and the sketch with the plaint and other evidence in the suit that the original nala bed was as shown in red in Ex.77, that it is pot kharab of class(b) under Rule 75(1)(b) of the Land Revenue Rules, that the plff who admittedly brought it under cultivation has been in unauthorised occupation of the same and has been using it for prohibited purpose and that therefore the notices issued by the Mamlatdar were legal and proper.

(18) The notes of Inspection are made by inspecting the changed bed of the Nala as is now existing and the inferences of the lower Court drawn by it thereon against the case of the defendant are erroneous.

(19) The notice under Sec.202 was issued on 23-3-1948 and therefore the lower Court ought to have held the suit to be barred by time.

98

(20) The findings of the lower Court on issues Nos. 3 to 6 are erroneous.

(21) The Judgment and decree of the lower Court are contrary to law and evidence in the case.

On these grounds among others, it is prayed that this appeal be allowed, that the decree of the lower Court be set aside and that the plaintiff's suit be ordered to ~~the~~ be dismissed with costs throughout.

In the Court of the Civil Judge(Srnior Division)

at Bijapur.

Civil Suit No. 224 of 1949. Ex.92.

(1) Gurappa Shivappa Koppad,age 55,
agriculturist,resident of Yekkundi
Taluka Bijapur. .... Plaintiff.

Vs.

(1) The Province of Bombay. .... Defendant.

Claim Rs 205/-

The plff sues to obtain a declaration that the order of the Revenue Authorities directing him to remove the alleged encroachment is ultravires and void. He also sues to obtain an injunction against the defendant restraining it from removing the alleged encroachment alleged in Paras 1 and 2 of the plaint. At the end he sues to recover the costs of the suit. The facts of the case as mentioned in the plaint may briefly be summarised as below.

2. The plaintiff is the owner of the S.No.84, which measures 7 acres 19 gunthas at Yekkundi. A Nala flows on the northern boundary of thisland S.No.84 and passes through the S.Nos. 85,86,87 etc. and also the S.No.84. The portion on which the said Nala flows is noted in the Record of Rights as Part of Pot Kharab or waste land. Another water course joined this Nala in the plff's land, S.No.84 and in order to prevent the soil of the land from being washed away, the plff's father constructed a pavement on this land about 75 years back at the mouth of the said water course, without changing the original course of the suit Nala. In 1943 one Hanamantappa, the owner of S.No. 64 complained against the plff's father that he (plff's father)

had changed the course of the suit Nala and thus encroached the Government land. The Circle In pector in collusion with Hanamantappa and the Village Patil made a false report against the plaintiff's father. An enquiry lasted for a number of years and the plaintiff's father did not attach any importance to the said proceeding. But the Mamlatdar of Bijapur suddenly issued a notice under sec. 202 of the Land Revenue Code against the plff asking him to remove the alleged encroachment. The plff preferred an appeal against the said order of notice, to the Collector, but it was dismissed.

3. The plff has not made any encroachment of any land. The plff's father was justified and within his rights in erecting the pavement without changing the course of the Nala and without causing any damage to the neighbouring lands. The plff is the full owner of the bed of the Nala as it flows in his land. There is no legal prohibition to bring the portion of thebed of the Nala under cultivation. The cause of action for the suit arose on 14-8-1948, when he received the intimation about the dismissal of his appeal. Hence, the suit.

4. The defendant in its written statement (Ex.23) contended that the plff was the owner of the entire S.No.84. It denied the allegation that another water course joined the suit Nala in the plff's field. It stated that the suit Nala flowed by the side of the said S.Nos. 82,84,85 and 86 on one side and S.Nos. 64,65 etc. on the other side and that it flowed throughout the year. It denied the construction of the pavement 75 years back. It also denied collusion between the Circle Inspector and the village Patil. It contended that the plff was legally entitled to bring under cultivation thebed of the Nala. It further contended that the notice under sec. 80, C.P.Code was not legal and proper and that the suit was not maintainable. It stated that the orders, passed by the Revenue Authorities were perfectly legal and not ultra vires. It contended that the suit was barred under article 14 of the Indian Limitation Act. It stated that the Pot Kharab of the S.No. 84 consisted of road and stream and that the plff was legally prohibited from cultivating the said pot kharab area, by

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changing the course of the Nala. It also contended that the suit as framed was not maintainable against the defendant. It prayed for its costs.

5. The following issues were framed by Shri M.M. Nadkarni at Ex.25:-

(1) Whether the description given of the deft in the plaint is not proper ?

(2) Whether the notice given by the plff to the deft under sec.80 of the C.P.Code is legal and proper ?

(3) Whether the plff is the owner of the whole Revision S.No.84 measuring 7 acres and 19 gunthas ?

(4) Whether the plff is the owner of the bed of the Nalla in dispute ?

(5) Whether by reason of the pavement and bund erected by the plff's father the course of the Nalla in dispute is changed ?

(6) If so, is the plff entitled to change the course of the Nalla in the manner that he has done ?

(7) Whether the Mamlatdar's order in dispute is illegal and ultra vires ?

(8) Is the suit in time ?

(9) What decree ?

On issue No.1:- Does not survive after the embankment.

Do No.2:- Yes.

Do. No.3:- Yes, asper R.Rs.

Do No. 4:- He is, as per R.Rs.

Do No.5:- Not proved.

Do No.6:- Does not survive.

Do No. 7:- Yes.

Do No.8:- Yes.

Do.No.9:- As per final order, granting declaration and injunction asprayed.

Reasons.

7. Issues Nos.1,2,and 8:- I shall first deal with the legal and technical issues. The defendant contended

in the W.S. that the suit had been filed against the province of Bombay and that the said description of the deft was wrong. The plff realised his mistake and got the title of the deft changed into that of the state of Bombay, by seeking an amendment. Now the present suit is perfectly in proper fxm form. I, therefore, record my finding on it as not surviving or in favour of the plff.

8. The deft contended that the notice, under Sec. 80, C.P.Code had been served on the province of Bombay and not on the State of Bombay and that the said notice was, therefore, not valid one. But the learned Government pleader should know that the Court permitted the plff to amend the title of the suit itself, and the said notice served by the plff can very well be treated as one, served on the State of Bombay itself. The purpose of notice under sec. 80, C.P.Code is only to intimate the Government before hand to settle the matter amicably with the party, if it finds proper and feasible. When the notice was served on the Collector by the plff, the Collector formally received it on behalf of the State of Bombay itself, though the notice had been addressed to the Province of Bombay. I, therefore, find no force in this contention of the deft. I accordingly record my finding on issue No.2 in the affirmative.

9. The learned Government pleader stated that the order was passed by the Mamlatdar on 8-3-1948 and that the suit had been f led af er the expiry of the period of one year (i.e. on 30-5-1949). He thusargued that the suit was barred under Article 14 of the Indian Limitation Act. The learned Govt.Pleader should note that the notice dated 20-3-1948 (Ex.71) had been actually served on the plff on 16-4-1948. The plff preferred an appeal against that notice to the Collector and the said appeal was decided on 23-7-1948; but the result of it was intimated to the plff on 12-9-1948. So, the limitation naturally commencesfrom 12-9-1948. Even if the date of the decision of the appeal is taken into account, still the suit would be in time. I may also state here that the first notice sent by the Mamlatdar (Ex.71)-was actually received by the plff on 16-4-1948 and if the period of limitation is to be recokoned from that date, one year's time will fall due on 16-4-1949. But

on that date the Bijapur Court had been closed for May vacation and it reopened on 30-5-1949. The suit was filed on the reopening day (i.e. on 30-5-1949). For this reason also the suit would be in time. I accordingly record my finding on issue No.8 in the affirmative.

10. Issues Nos. 3 to 7:- The plff is admittedly the the owner of the S.No.84 and the entries in the Record ofRights (Ex.79) clearly show that the plff's father is the owner of S.No.84 and that it measures 7 acres 19 gunthas. Out of this area of 7 acres 19 gunthas, the area of one acre 2 gunthas is described in the Records of Rights, as Pot Kharab and the plff does not challenge these entries. It is also admitted by the parties that a Nala flows from east-west through the S.Nos. 82,84,85, 86 etc. and that the bed of the Nala is entirely within the area of the S.No.84 .Ex.77 is the sketch of the x relevant survey numbers and the Nala and it was prepared in the year 1946, by the Revenue Authorities (i.e. D.I.L. office). The present alleged encroachments on the bed of the Nala are marked by red pencil by figures I,II,III, IV,V and Vi in the said sketch. The Revenue authorities considered that the plff and constructed an embankment along theline I.II ,III ,IV,V and Vi, changed the course of Nala and brought the bed of the Nala undercultivation. The Mamlatdar, therefore, served a notice to the plff under Sec.202 of the Land Revenue Code, to remove the said encroachments. The portion marked by red pencil, is now used by the plff as a cultivable land. It is not clear from the Mamlatdar's order (Ex.71) or (Ex.72) if he asked the plff to remove only the portion marked by red pencil or both the said portion and the embankment along the line I,II etc., shown at Ex.77 . I inspected the suit site anddrew my own notes at Ex.95. I found that the suit Nala was flowing between two hill-like dams or sloping fields. In a word, it can be said that the suit

Nala is a vally between two highly situated fields. The white portion, noted in the sketch (Ex.77) between blue portion and the red portion is nothing but a sloping hill, covered with bushes, trees, bamboos etc. There are two old babul trees also growing on that sloping portion. I do not think that the water of the suit Nala would riseeven up to half the height of both the dams of the neighbouring lands S.Nos. 64 and 84. I think that thousands of rupees will berequired to remove the earth , trees, bushes etc. from the white and the red portions andbring the said area to the level of the blue portion of the notice,Ex.72 meant it. If the Mamlatdar had visited the suit propert es, the two could have certainly come to know that it was not possible to remove the earth from the red portion andbring it to the level of the Nala. It also looked impossible that the plff could have turned the white and red portions into a sloping hill and the filed respectively by putting an embankment or dam along the line IV,V,VI and change thewater course towards the points M N at Ex.77 unless the owners of the eastern lands (S.No.82 etc.) also changed the course of the Nala successfully at the great distance from S.No.84, towards theeast.

11. I am at a loss to know why the plff did not insist on the Revenue authoritiesto visit the suit land and the Nala and pass the suitable orders in the matter. He could haverequested the Mamlatdar or his higher authorities to levy the assessment and take compensation, in case they considered that the red portion was an encroachment, according to their records, instead of coming to the Court andwaste his money on the litigation. Before visiting the site, I was under the impression that the plff might have encroached the portion of the Nala-bed itself, by putting the embankment etc. But, after visiting the site, I dound that the plff could not have changed the course of the suit Nala by putting embankments , in view of the situation of the Nala and the lands which are situated on both the sides of the Nala to the east of theS.No.84 and 64.

12. It istrue that the plff has put some stones and planted some shrubs by way of pavement, at thewestern end of hisland,

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close to the Nala in suit. But the said pavement too, could not have diverted the course of the Nala, as it flows from east to west by a particular route and as the land of the plff near that pavement slopes down from the south to north. It is possible that the plff put the said pavement of stones and bushes to prevent the flow of the earth of hisland into the suit Nala, by another small brook-let flowing from south to north as per allegation of the plff. No one has actually seen the plff or his father putting the alleged suit embankment along the line I, II ,III,IV,V and Vi and the deft's witness, the Kulkarni (Ex.91) approximately gives his opinion regarding the date of the construction of it. As stated above already, it was not possible for the plff or his father to expend a large sum of money on the construction of the alleged suit embankment for encroaching a small strip ofland, marked with red pencil at Ex.77. Moreover, it looks unnatural and improbable that plff's father would spend his money and labour to put the embankment on the bed of the Nala itself (if water flowed over that bed) without heeding for the possible or probable destruction of it by the floods of the Nala, during the rainy seasons.

13. It is on record that an enquiry about the alleged encroachment first started on the application, Ex.78 of one Hanmantbhat, the owner of the S.No.64 in the year 1943 Hanmantbhat stated therein that the father of plff had startedconstructing a dam or an embankment recently and he prayed in it that plff's father should be restrained from doing so. It can be gathered from it that the embankment was still incomplete in 1943. But the Mamlatdar did not order the plff or his father to stop the work, if the construction was still going on. The said application or the proceeding was pending before the Re venue Authorities from 1943 to 1948. The Circle Inspector visited the suit Nala , and lands and prepared a sketch (Ex.76) on 4-6-43

and he did not make mention in his report, of the completion or incompletion of the embankment; but simply stated that the embankment was in existence and that it was an encroachment on the bed of the Nala. The plff's father had been fined for having encroached the bed of the Nala or for having constructed an embankment, in the year 1937-38(Ex.75). It is not clear from Ex.75 that the plff had constructed a similar embankment in 1937. It is possible that the father of the plff brought some portion of the Pot Kharab (i.e. the portion marked by red pencil in E .77) under cultivation by planting some shrubs etc. to the north of that portion. But the planting of such shrubs could never have changed the course of the Nala, which was flowing from the east to west, to the north of the said red portion. Unless the owner of the S.No.82 and the other owners of the lands, situated to the east of S.No.82 had diverted the course of the Nala, there was no possibility for the plff to turn the red portion Pot Kharab into a cultivable land by constructing an embankment on the Nala bed. It was not possible for the owner of one land to change the course of the Nala or shorten the width of it by ercting the embankment of the nature, marked by fifures I,II,III,IV,V and VI at Ex.77.

14. The learned Government pleader argued that in view of the sections 48,61,121 and 202 of the Land Revenue Code, the Mamlatdar with the sanction of the Collector was entitled to order the plff to remove the encroachment, if any, on the Pot Kharab falling under class (b) of Rule 75. Nobody challenges the powers of the Mamlatdar or the Collector under those provisions and no one dispute about the orders of the Revenue authorities if they are leggily passed. It is to be seen now if the suit encroachment falls under class (b) of Rule 75 of Land Revenue Rules and if it can be removed by the Collector or his deputies under sec. 48 or 61, read with sec. 202 of the Land Revenue Code.The learned Government pleader argued tht the said red portion at Ex.77 was formerly the bed of the suit Nala and he relied on the Revenue redords Ex.s 73,75, and 79 and the map Ex.77 in support of his argument. But it can be seen from Ex.73 that out of the total area of the Pot

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Khatab of 42 gunthas, the portion of 14 gunthas only is shown as the area of the Nala bed. The remaining portions (gunthas) of the total area of the Pot Kharab are shown as foot-path etc. The deft did not prove that the red portion at Ex.77 fell within the area of the said 14 gunthas, mentioned at Ex.73, though the proceeding is pending from 1943 till now. It can be gathered from Ex.73 that the area of 17 gunthas of Pot Kharab was neither the bed of the Nala nor the foot-path and that it was lying waste. It is possible that plff's father brought the said portion under cultivation.

15. In 1943 Hanmantappa stated in his application (Ex.78) that the plaintiff's father had constructed the embankment in 1937, that it had been washed away by rain before 1939 and that he had been fined by the then Mamlatdar. The said person further stated in the said application that the plff's father had started constructing a new embankment once again and that the former would be put to a loss on account of it. But it is curious to read the report of the Circle Inspector (Ex. 81), made in the year 1944, when he says that the embankment marked by the figures I,II, III, IV,V and VI had been constructed in 1937-38 and that the notice under Sec. 202 of the L.R.Code should be served on the plff's father to remover the embankment. I do not know how the said circle Inspector came to know in 1944 that the plff's father had been fined in 1937-38 in respect of the construction of the said embankment. In view of the allegations of Hanmantappa, made at Ex.78 the statements of plff's father Exsh. 81 and 86 and the steps taken by the Revenue Authorities for x recovering the measurement charges from the plff's father for disposal of Hanmantappa's application,

it can be said that Hanmantappa complained of the pavement constructed by the plff's father between the lands S.Nos. 84 and 64 and not in respect of the suit embankment. It is not known at whose costs the lands were measured in the year 1946 (Ex.77), when the plff's father refused to pay the charges. In view of Ex.83 it can be said that the plff's father did not accept the measurements shown at Ex.77 as correct and that he desired for the fresh measurements. When the matterwas still pending in 1946, I am at a loss to know how the Circle Inspector made the report (Ex.81) in the year 1944 to the Mamlatdar for issuing the notice under Sec.202 of the Land Revenue Code to remove the encroachment, against the plff's father. In this connection the report of the village officers (Ex.85) is also worthnoting. They say in it that Hanmantappa will be put to a great loss if no steps were taken against the plff. There was no necessity for the village officers to report to the Mamlatdar by way of a reminder to expedite Hanmantappa's application and plead on hisbehalf, of their own accord. It can be seen from this report Ex.85 that the village officers were interested in Hanamantappa or that they wanted to do some harm to the plff, for some reason, of the other.

16. The Mamlatdar again asked the plff to pay the measurement charges probably for getting the lands of the plff and Hanmantappa measured. The plff refused to pay the measurement charges, but he requested the Mamlatdar to visit the properties in question and pass some reasonable orders according to his discretion and expressed that he (plff) would obey those orders. But there is nothing on record to show that the Mamlatdar visited those properties. All these proceedings were going on from 1943 to February 1948, after the receipt of Hanmantappa's application (Ex.78) and the said application was still pending disposal. I see no final orders, passed below Ex.78 till to-day. But suddenly in August 1948 notice under sec.202 of the Land Revenue Codewas issued by the Mamlatdar. The plff appealed against that order, but his appeal was dismissed in the said year. He then came to the Court. After the filing of the suit, the

Mamlatdar sent the order to the Circle Inspector to supply the information regarding the nature of Pot Kharab of the S.No.84 and the use of the Nala water. The Circle Inspector consulted the village officers and submitted his report, (Ex.74) stating that the plff's Pot Kharab fell under the category of (b) class of Rule 75 and that the Nala was flowing throughout the year. It can be seen from the report of the village officers, attached to Ex.74, that they (village officers) through over enthusiasm voluntarily added that the plff had changed the course of the Nala 8-10 years back. Thisreport of the village officers may show that they were trying to prejudice the mind of the higher revenue authorities against the plff. The Kulkarni, Ex.91 undoubtedly bears grudge against the plff. It is not know why the Mamlatdar wanted to know the nature of the plff's pot kharab portion in 1949 (after the filing of this suit by the plff) from thecircle inspector. It is also not clear how the village officers and the circle Inspector came to know that the plff's entire pot kharab portion fell under class B of rule 75(1) of the L.R.Rules, when there was no description of the said Pot Kharab in the Record of Rights,Ex.79 (as per Anderson's Manual of Revenue Accounts). At the time of hearing, the Kulkarni, the witness for thedeft stated in the examination-in-chief itself that the Nala would remain dry for a month or two in a year.When I visited the suit Nala, I could guess from the situation, condition and narrowness of it that the Nala could hardly flow even throuhout the rainy season. In view of the facts and the circumstances of the case, it can be stated that the learned Mamlatdar issued the notice under sec. 202 of the L.R.Code without first ascertaining the nature of

the pot Kharab ofS.No.84 and the exact position and condition of the suit Nala and that he began to collect the required information after the filing of the present suit to meet plff's case.

17. The story of the defendant was that the plff had put the embankment (i.e. I,II,III etc. at Ex.77) on the bed of the Nala and brought the portion of the Nala bed (i.e. the portion marked with red pencil) under cultivation. Accordingly the learned Mamlatdar had asked the Circle Inspector below Ex. 72 to report about the removal of the encroachment. But at the time of the argument, the learned Government pleader stated that the plff had brought the suit red portion under cultivation without first obtaining the permission from the Collector and that the said act amounted to an encroachment. He then argued that the Mamlatdar ordered the plff under Sec.48 of the Land Revenue Code to remove the said encroachment by issuing notice under Sec.202, meaning that the plff should not cultivate it without first obtaining the permission from the Collector. If the learned Mamlatdar had meant like that and if he had made the saidfact clear in his order, the plff would surely have approached the Collector and obtained the required permission by agreeing to pay the assessment oreven fine, if the said portion fell within the area of the Nala bed. But the learned Mamlatdar ordered Circle Inspector below Ex.72 to remove the encroachment if it had not already been removed. The Revenue authorities ought to have first measured the pot kharab and fixed up the boundary of 14 gunthas of the Nala bed, as per Ex. 73 and then ascertained what portion of the Nala bed had been encroached by the plff. The learned Government pleader also argued that the plff had put the embankments or pavements to the East and West of his land near the Nala (i.e. I & II and V and VI) and that the plff should remove them as the width of the Nala is narrowed down and as Hanmantbhat's land would be damaged, on account of the construction of those pavements. If Hanamantbhat suffers a loss, he can easily take steps against the plff in a proper Court and I need not decide such questions here behind the back of Hanmantbhat. The Revenue Authorities themselves have

not redressed Hanmantbhat's grievances by passing some orders below his application, Ex. 78, though he requested the Mamlatdar to grant some relief.

18. The alleged embankmentsdo not at all now obstruct the free flow of water of the Nala. However, as stated above, the question whether the alleged embankment and the portion marked with red pencil are the encroachments or not, can be decided after measuring the Nala bed of 14 gunthas and fixing the boundary of it. It is not known why the learned Mamlatdar at once served the notice under section 202 of the Land Revenue Code in respect of the alleged encroachment when the plff refused to pay the measurement charges in February 1948, in a proceeding which was started first on the application of Hanamantbhat without passing some orders below that application. Even assuming that the plff has brought the Nala bed under cultivation by putting the pavements or embankments, he can do so as he is the owner of theS.No.84 and as the Nala or brook flows in hisland. I rely on the decision of the Bombay Revenue Tribunal, in the case No.192 of B.R.Bagal(cited by Gupta in the commentary of his L.R.Code under Section 48) and also on Narhar Singh vs. The Secretary of State, 43 Bombay Law Reporter 167 in support of my view. There is nothing on record except the exparte reports of the village officers and Circle Inspector, Ex .74, that the suit Nala bed is of the class B of Rule 75(1) of the Bombay Land Revenue Rules or that the suit Nala flows throughout the year.The Kulkarni, Ex.91 could not stick to the report, Ex.74 and the Circle Inspector did not step into the witness box to support his report,Exh.74.

19. The proper course now would be that the defendant should measure 14 gunthas of the Nala bed in S.No.84,fix up the boundaries of the Nala bed and

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take the proper steps under the provisions of the Land Revenue Code against the plaintiff, if he is found to have encroached any portion of the said Nala bed. The plaintiff may then request the Collector to levy the assessment for such an encroachment or even may agree to pay the fine, if the latter demands it. As it is not proved that the plff committed any illegal act by encroaching the Nala bed, the notice, served on the plff under Sec.202 of the Land Revenue Code, is not proper and legal. In view of the facts and the circumstances of the case, I record my findings on all these issues accordingly in favour of the plaintiff and pass the following order. In the circumstances, I award no costs to the parties.

ORDER.

It isdeclared that the notice issued by the learned Mamlatdar against the plaintiff under Section 202 of the Land Revenue Code is not proper and legal. The defendant is restrained from ordering the plff to remove the encroachments, mentioned in paras 1 and 2 of the plaint. The defendant may take the proper and necessary steps against the plaintiff under section 48 or Sec.61 of the Land Revenue Code for levying assessment etc, for the portion, found to have been encroached by the plaintiff, after getting the Nala-bed measured, as per Ex.73.

The parties do bear their own costs.

15th October 1953.

Sd.M.H.Kazi.
Civil Judge(Sr.Dn.).

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Exh. 71.

No.N.C.R.505.
Bijapur. 6-3-1948.

Submitted to the Prant officer, Bijapur Division,
Bijapur.

(2) The encroacher in this case is unwilling to remove the encroachment as shown in the P.T.sheet nor to credit theappeal measurement fees. Hence, sanction may kindly be ~~ordered~~ accorded for issuing notice under Sec.202 L.R.C.

Sd. x x x.

Mamlardar, Bijapur.

No.N.C.R.-596.
Bijapur 8-3-1948.

Returned.

The proposal of the Mamlatdar for issuing notice under sec. 202 L.R.C. is approved.

Sd. x x x.

D.D.C.Bijapur Dn.
Bijapur.

To

Gurappa Shivappa Koppad of Yekkundi.

You are hereby informed as follows:-

Whereas you are in unauthorized occupation of the below mentioned land and whereas the Collector has power to evict you under Sec.202.of L.R.C.,

I, R.S.Bhupali=Mamlatdar Bijapur Taluka give you notice in accordance with Sec.202 of L.R.Code to give up the said land within 7 days of the receipt of this notice.

The description of the land:-

Village:- Yekkundi in Bijapur Taluka.

S.No. Area of the cultivated/bed of the Nalla in S.No.84

23-3-1948. Sd. x x x.

Mamlatdar.

(This was served on the plff on 19-4-1948).

Exh.72.

Copy of the Order of the Collector dated 23-7-1948.

Order.

The appeal is summarily dismissed since the appellant has made an obvious encroachment on Government Nalla.

Sd. x x x.

Collector of Bijapur.

Copy to the appellant.

The P.O. Bijapur Division, Bijapur, with the case papers for further action.

Sd. x x x.

For Collector of Bijapur

No.L.N.D.A.P.25 6-8-1938 Bijapur.
Forwarded to the Mamlatdar of Bijapur with case papers for necessary action.

Sd. x x x.
P.O.Bijapur Divisions,
Bijapur.

Eviction notice under Sec.202 of L.R.C. issued to the encroacher on 17-8-1948 and sent for service through the V.O.S.

17-8-1948. (P.T.O.

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To

Gurappa Shivappa Kopad of Yekkundi.

You are hereby informed asfollows:-

Whereas the below mentioned land is in your unauthorized occupation and whereas according to Sec. 202 of L.R.Code, the Collector has power of eviction , I, R.S.Bhupali, Mamlatdar of Bijapur, give you notice under sec. 202 of L.R.C. to give up the said land within 7 days from the date of receipt of this notice.

The description of the land above referred to:-

Village.
Yekkundi in Bijapur Taluka

S.No. on the bed of Nalla in S.No. 84.

Sd. x x x.

7-8-1948. Mamlatdar.

(The details of service of this notice on 12-9-1948 on the plff are not typed here).

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Exh. 73.

Information about Pot-Kharab of 1 acre and 2 gunthas deducted from S.No. 84 of Yekkundi Taluka, Bijapur, from Pratti book of1885 (column No.6).

Column No.6:- In this land Kharab for way width of 4 annas and length of 44 - thus 11 gunthas , for Nalla width 4 annas length 14 - now 8 annas part and 17 gunthas according to the portion = 1 - 2.

True copy prepared for the use of the District Govt.Pleader, as per his No. 550 of 17-1-1951.

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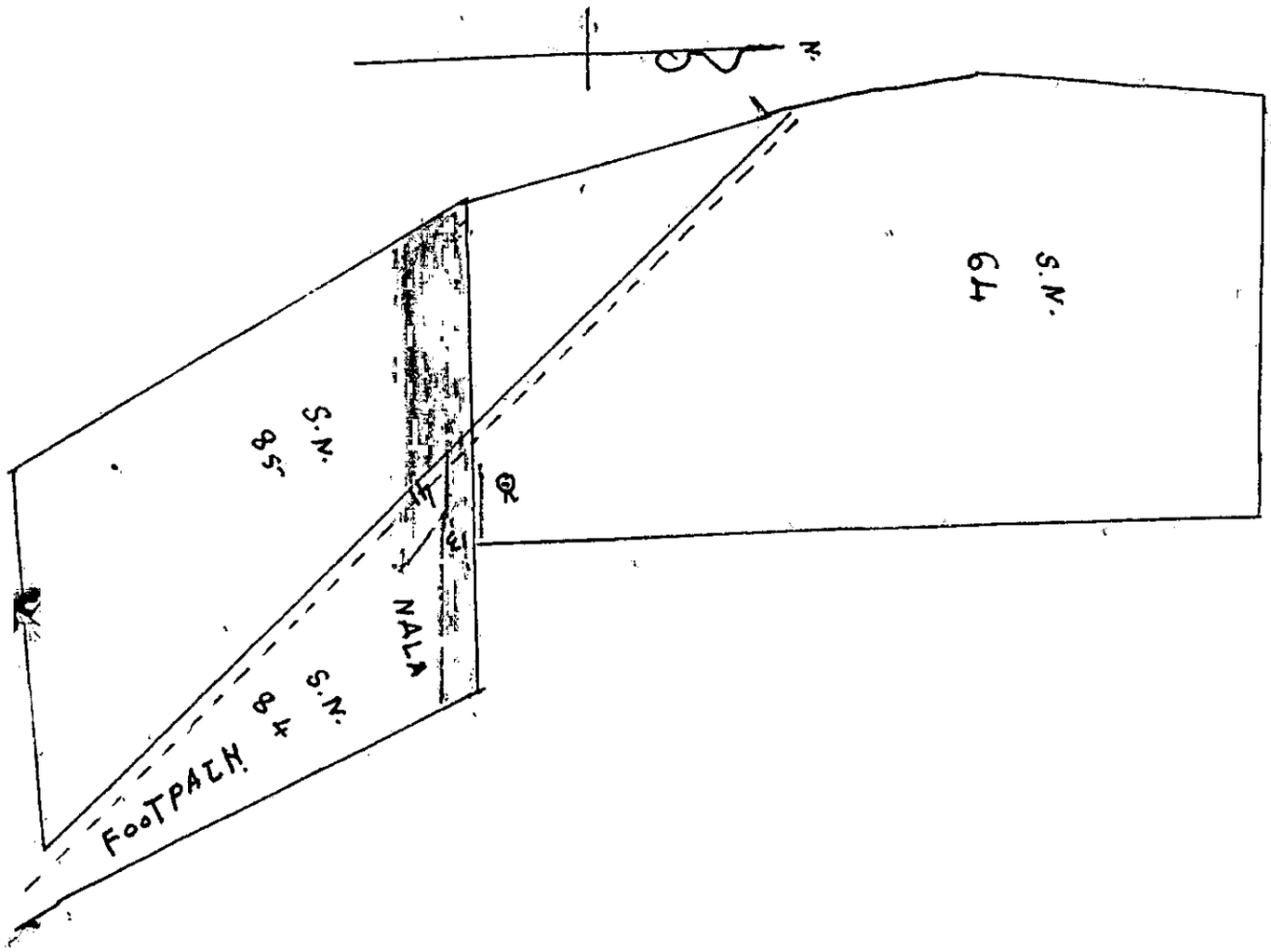


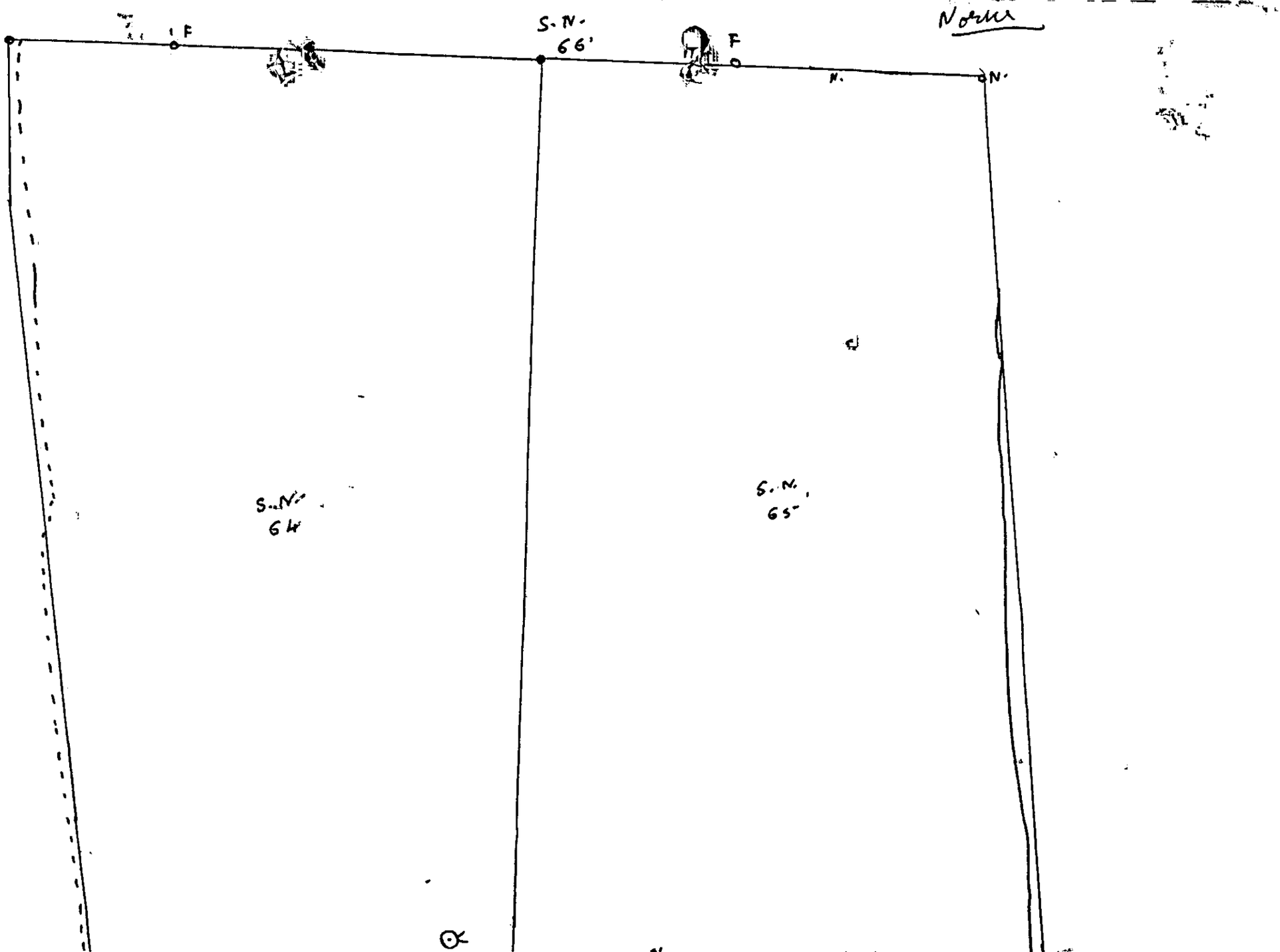
Note:- Blue mark denotes the bed of the Nalla.

Red mark denotes the bund line.

The bund towards the north of S.No. 84 in the Nalla and 41 feet of Nalla has been encraoched upon. The original bed of the Nalla of 54 feet has been encraoched upon to the extentof 41 feet and the Bed of the Nalla has been made as 13 feet wide.

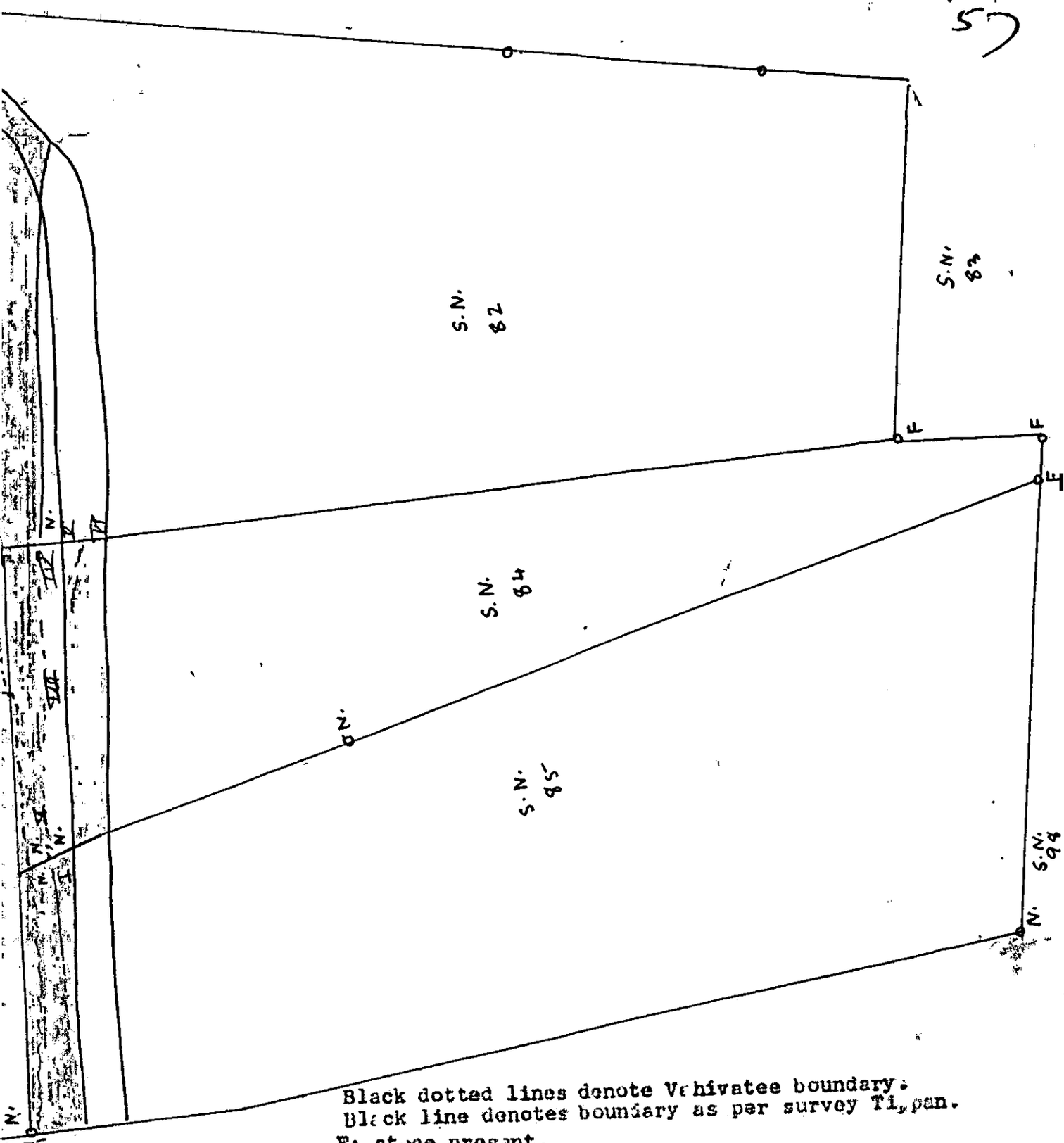
Sd. x x x.

4-6-1943. C.I.


F
S. N.
66'
F
North
N.
N.
S. N.
64
S. N.
65

125

57


S.N. 82
S.N. 83
S.N. 84
S.N. 85
S.N. 94
F
F
F
N.
N.
N.

Exh.79.

V.F.No. 7. village: Yekkundi in Bijapur Taluka.

S.No. 84.

Area:- cultivable ... 6-17

Pot-kharab ... 1-2

Total:- ... 7-19.

Assessment ... 3-0-0.

Kabjedar:- Shivappa Mallappa Koppad.

True copy 9-12-1942.

S.L.Kulkarni.

.....

129 61

Exh.80.

I, Shivappa Mallappa Koppad, 85, agriculture, of Yekkundi got written :-

Answers to questions.

S.No.84 of Yekkundi belongs to me. Towards the north of that land. Its width from the embankment duly put up by me is 13 feet. That width was there from the first. I have put the new embankment along the boundary ofmyfiled. I have not put embankment in Government Nalla and have not encroached.

27-5-1943.

Read over. It is correct.

Left thumb of Shivappa Mallappa Koppad.

Before me.

Sd. x x x.

C.I.

.....

+31 133

63

Exh.81.

No.276.
Yekkundi. 13-11-1943.

Resubmitted :

(2) The encroacher avoids his presence whenever he ~~xent~~ iss sent for. The undersgined visisted the village on 8-1 -1943 and sent for him but he did not turn up and absconded. Again, the undersigned visited the village on 13-11-1943 and ~~e~~ent for him but he repeated the same thing. This clearly shows that he does not want to pay the sum. In these circumstances, my submission is that he may be served with a notice under Section 202 L.R.C. and the encroachment should be removed as done previously in the year 1937 by the then Mamlatdar.

Sd. x x x.

C.I.

R.K.

Put up N.C.R. - 278 . Filed in 1939 as T.C.

12-1-1944. Sd. x x x.

Mamlatdar.

Returned w/r.

(2) Searched for the correspondence in the years 1939 and 1940. It is not forthcoming.

26-4-1944. Sd. x x x.

R.K.

.....

133

135

65

Exh.83.

To

D.I.L.R.,Land Records, District Bijapur.

Applicant Gurappa Shivappa Kop of Yekkundi in Bijapur Taluka applies as follows:-

4 months ago I applied on behalf of my father that there is no necessity to measure S.No. 84. Yet, when I was not in the village, the Circle Inspector threatened my father to recover measurement fee and recovered the amount. One month ago, the surveyor measured the land and said that the Nalla therein had been diverted to the northern boundary of the land. But this is wrong. The Nalla is in the same place since the last 50 years. The owners of the lands above my land have diverted the bed of the Nalla many years ago and they have put embankment. Hence, the Nalla in my the above landsis in the same place where it was before. Without making this clear, nothing can be known. Hence, I do not agree to the measurement now made. The Nalla is in the present place since the last 50 years. Hence, applicant Hanmantbhat Jivanbhat Joshi cannot get any relief in before Revenue officers. His remedy in Civil Court even is barred by time. Further, there has been no damage to his land nor is there any likelihood of damage to hisland. The measurement now made should be cancelled.

Sd. Gurappa Shivappa Koppad.

12-3-1946.

C.S. measured on 16-2-1946 about Nalla encroachment under ~~Nax~~ M.T.No.708. On examining according to P.T.sheet, the measurement is correct. Hence it is not possible to cancell the measurement as prayed for by the applicant. If the applicant so desires, he may proceed seperately by producing measurement fee. Hence, filed.

10-4-1946. Sd.D.I.L.R.Bijapur.

[3] 124
67

Exh.X 84.

No. 708 of 1947 ..

Bijapur. 30-1-1947.

To

The Mamlatdar,Bijapur Taluka.

According to your No. N.C.B. 505 of 20-10-1945, copy of P.T.sheet prepared by C.S.after measuring by giving notice to the applicant and the Kabjedar and measuring in their presence and in the presence of the village officers is annexed herewith Detailed notes are written on it.

According to the P.T.Sheet current flow of the Nalla is shown in blue pencil. The place shown in red colour in S.No.84 is the place of the former Pot-kharab Nalla. It is now under cultivation.

At the place where embankment and pavement are made are shown as I to VI. The statements of the Kabjedars of S.No. 64 and 84 about the embankment of the Nalla in question are amongst the papers. Further action may be taken after due inquiry.

The measurements in revision in the said S.No. are found to be mistaken. Necessary papers will be prepared and sanction would be obtained for correction from S.L.R. S.C.

Sd. x x x.

D.I.L.R.Bijapur.

Forwarded with compliments to C.I.Babaleshwar for further necessary action.

18-2-1947. Sd. x x x.

Mamlatdar.

137
69

C.S.No. 224 of 1949. Exh.No. 90.

Deposition of witness No.1 for the ~~plaintiff~~ deft

I do hereby on solemn affirmation state that:-

My name is Gurappa Father's name Shivappa.

Religion .. Caste..

Age about 52 Occupation:- agriculture.

Residence:- Yekkundi. District:

Examination-in-chief.

I am plaintiff. The S.No. 84 belongs to me. One Nalla in it flows from the East to west. One brooklet flows in it and it joins the big Nalla (brook) in my land itself. My father put some stones at the mouth of the brooklet to prevent the soil of land from flowing away. I did not change the course of the Nalla at all. We had a bund along the brook from the ... ...

... The owner of S.No.64, Hanmantbhat made an application to the Mamlatdar that I had obstructed Nalla Then the land was measured behind my brook by the Government. I informed the Mamlatdar that the measurements were not made properly by the Surveyors. The Mamlatdar did not personally visit the land and Nalla as per my request but he served me a notice to remove the encroachment. I preferred an appeal but it was dismissed. I filed the present suit by serving the notice, ...

2. There is a dam of Hammantbhat at the southern boundary of his land. The brook flows only during the monsoon . The villagers do not make use of the water of this brook or Nalla. The distance between my land and the village is about half a mile. The pot Kharab of the S.No. 84 belongs to me and not to the Government. There is no change in the width of the nalla on account of the putting of the stones at the mouth of the brooklet and the alleged encroachment, belongs to me. The village officers and Hanamantbhat are friends to one another and they are not on good terms with me.

3. Cross.

I do not know if my father had been fined for having put the dam near our land and made the encroachment , Our father was alive when the land was measured by the Surveyors. (i.e. he died 4-5 years back) I had made the application to the District Inspector of Land Records complaining of the measurements made by his Surveyors. He informed me that I should pay the fees afresh and get the land measured if I desired, I made the statement before circle Inspec or that I was not ready to make payment of the fees and get the land measured. I also stated that the Mamlatdar should decide the matter by seeing the site.

4. The Nalla isflowing from a long distance and flows into another brook and then the said brook joins the river, Krishna . I do not know the exact breadth of the nalla before or now. There is no change in the width of the nalla at any time according to my knowledge . The cattle drink water in the nalla during the monsoon. The people do not make use of the water of this brook for drinking purpose or washing clothes. No water pits are dug in the nalla durin the scarcity of water. No temporary wells also are sunk in it by any one. I cannot say why a portion of 1A-2G is a pot Jgarab in my S.No. or why it is left so. The brooklet comes from 4-5 lands only and it flows into my land and joins the brook. I do not know when the bund at the ... of my land had put in. I had given an a plication against the Kulkarni for his misconduct in the village. So he is a enemy with me. I had made the application last year to the Mamlatdar and he has deposed against me on 3 occasions. Some proceeding is also pending againstt me for removing the boundary stones and the village officers deposed against me in that proceeding.

5. Re: That proceeding started at the instance of Hanamantabhat.

6. To Court: There is some partition of my land beyond the limit of the nalla and adjacent to that portion, Hanmantbhat has got this land.

139/47
31

7. At the req est of Government pleader :

Cross:- There is a foot path in my land and it goes from Yekkundi to Sangapur crossing the Nalla.

Sd. M.H.Kazi.

7-8-1953. Civil Judge,Sr.Dn.

14/43
73

C.S.No. 224 of1949.

Exh.91.

Deposition of witness No.1 for the defendant No.

I do hereby on solemn affirmation state that:-

My name is Bhimaji father's name Gundo Kulkarni.

Religion Caste.

Age about 47 occupation: agriculture.

Residence Arjunagi. District.

.....

Examination-in-chief.

I officiated as Kulkarni of Yekkundi from 1938 to 1952. The width of the suit nalla between the S.Nos. 84 and 64 was 54 feet. I tell this from the map and also one can see the trace of it. This brook flows from Halagni and it may be flowing from a great distrance. The brook contains water practically throughout the year and it dries up for a month or two only. The public dig temporary pits for water and make use of it during summer. The public also use the brook water for the cattle or fot washing clothes and temporary wells are also sunk by the neighbouring land owners. The width of the nalla between those of S.Nos. is now only 13 as the plaintiff put a dam on the brook in 1938-39. by his father. plaintiff's father was therefore fined. Plaintiff's did not remove the said encroachment though hewasfined. On account of plff's father's act Hanmantbhat also aggrieved. His well wasfilled with mud and his land was damaged. He therefore made an application to the Mamlatdar . The proceedings therefore started against the Circle Inspector measured the land and prepared the sketch. The plff's father was present at the time of the measurements and also at the time of preparing the sketch. Plff's father agreeed to remove the encroachment then. The land Record office also measured it. plff's father was present at the time of that measurement also. The plff's father died. The plff

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refused to remove the encroachment or to pay the fees for remeasurements. The Mamlatdar served notice to the plff to remove the encroachment after obtaining the permission from District Deputy Collector. His appeal also was dismissed by the Collector. The Patil and I had requested to the Mamlatdar after receiving the complaints from the willagers. I see it now and I admit it. The pot kharab of 1A-2G in S.No. 84 isleft for the footpath and brook (nalla). I am not on cross terms with the plaintiff.

2. Cross:- The brook flowed entirely in the land of the plaintiff. S.No. 84. Now it touches the boundary of Hanmantbhat's S.No.64. There is an old dam to the south of Hanmantbhat's land, and it was existing there prior to 1938. Its height may be 10-12 feet. I do not remember if there are trees or bushes growing on this dam. Plaintiff's land to the north of the suit land formerly may be about 50-60 feet. In 1938 the plff's father had already encroached the suit portion (i.e. the suit encroachment was already existing). I do not remember if I requested to the Mamlatdar when plaintiff's father did not remove the encroachment even after he was fined. The Circle Inspector measured the width of the brook in 1938-39 and after that I did not measure the width of it. I had seen the brook and the lands before the encroachment ile. before 1938. The width of the vicinityx of the nalla on either side was the same as that near plaintiff's land. We measured the width of the nalla at 3-4 spots and I cannot say now at what we measred.

3. The owner of the S.No. 85 has also got a claim to the southern end of the nalla but not at the northern end of it. Plff's dam was 8-10 feet high a year back. Bushes and bamboos ... were growing on it. I cannot say how the water course is changed. Nxxxxx The Nalla flows to the north of plff's dam. I cannot remember how many times the suit land was measuredafter the receipt of Hanmantbhat's application. I do not remember if I ever on any occasion prior to 1949 that the brook was flowing throughout the year. Villagers do not use the brook for drinking water but the owner of the neighbour ng lands use the water

of this brook for drinking purposes. There are 4-5 gardens around the S.No.84. It is true that the people wil will have to pay the charges obtain permission and make use of brook water for the lands. But the people do not observe the rule. I do not know the names of the people who sunk temporary wells in the brook. I only remember mentally that the plaintiff's father and Hanmantbhat were present when the lands were measured.

4. I cannot say now why I sent the report Ex.4 with Ex.30. I might have deposed against the plaintiff in a criminal case before the Sub-Inspector for having cut the tree some 3-4 years back. I was examined by the Mamlatdar in the proceeding held against the plaintiff for having removed the boundary marks stones.

5. Re: I was examined by the Police Sub-Inspector as a village officer.

7-8-1953. Sd.M.H.Kazi.

Civil Judge,Sr.Dn.

.....

Exh.95.

Regular Civil Suit No. 224 of 1949.

INSPECTION NOTES.

Visited the suit properties in the company of the learned Government pleader, the Assistant Government pleader and the pleader for the plaintiff to-day, the 27th instant at 12 noon. The V.O.S., the C.J. ~~Civil Judges~~ were present.

.....

(1) The brook or Nala in suit appeared to me like a valley near the S.No. of the plff and the lands of a few others. It is very steep near plff's land.

(2) The bushes, the trees and bamboo are growing at the bankoftheNala and in the Nala itself here and there. There were 2 babool trees at the bank towards plff's land and they appeared to me pretty old.

(3) As both the ends of the bank are of a great height, they appear like big dams.

(4) The plff has put some stones at the western end of hisland near the bank of the nala or in the nala and the width of the Nala is very narrow at the said spot.

(5) No damage will be cau ed to any one if the Nala is left in the present state as the height of the bank is very great near plff's land. Plff has put a hedge of the shrubs at thebank of the Nala.

(6) It is only a question of encroachment if the plff is in posses ion of any Government land or the portion of Nala.

27.9.1953. Sd. M.H.Kazi.
Civil Judge, Sr.Dn.Bijapur.

.....

201 79

Decree.

In the Court of the Civil Judge, Sr, Dn, Bijapur.

At Bijapur.

Civil Suit No. 224 of 1949.

Gurappa Shivappa Koppad, Lingayat, age 55, agriculturist, residence Yekkundi Taluka Bijapur. ---------- Plaintiff.

Versus.

The State of Bombay. ---------- Defendant.

Suit filed on, 30-5-1949.

Suit registered on 24-6-1949.

Claim Rs. 205/-.

Herein the abovenamed plaintiff states as follows:-

(1). The plaintiff is the owner of the entire R.S. No.84 - measuring 7 acres 19 gunthas assessed at Rs.3, situated at Yekkundi in taluka and district Bijapur. The plaintiff's father and thereafter the plaintiff was and is in enjoyment of the same land since long. A Nala flows on the northern boundary of this land and passes through R.S.Nos.85, 86 and 87 of the same village and the portion of this land where the nala flows ø is shown as waste in the Record of Rights . Another water course joins this Nalla in plff's land. The plaintiff's father Shivappa, with a view to prevent the soil of the land being washed away by the small water- course constructed about 75 years ago a pavement by collecting stones at a point where the small water course joins the nalla in his land without changing the original course of the nalla and without touching the long-standing northern bund of the plaintiff's land. In 1943 one Hanamantappa, the owener of R. S. No. 64 moved the Mamlatdar of Bijapur alleging that the plaintiff's father had changed the course of the Nalla and had made the encroachment of the Government land. The Mamlatdar forwarded this application to C. I. for enquiry and report. The Circle Inppector in collusion with the applicant Hanamantappa and the village patil, who is on inimical term with the plff got a false and onesided report made. Thereafter

the matter was dragged on for several years and the plaintiff thought that the proceedings had been filed by the authorities as not worth proceeding . But the Mamlatdar of Bijapur issued a notice under Sec. 202 of the Bombay Land Revenue Code asking the plaintiff to remove the encroachment . The plaintiff received this notice on 16-4-1948. The plaintiff ~~received this notice~~ reprerred an appeal against the said notice to the Collector of Bijapur which was summarily dismissed and the intimation of which was received by the plaintiff on 14-8-1948.

2. The plaintiff has not made any encroachment of the land The plaintiff's father was justified and as within his rights in constructing the pavement without changing the course of the Nalla and without causing any damage to the neighbouring land-owners to preserve the soil of the land. The defendant owns no portion of the land nearby or in the bed of the nalla which falls entirely in the land of the plaintiff. The plaintiff is the full owner of the bed of the nalla . If by construction of the pavement some portion of the nalla bed is brought under cultivation it does not amount to an encroachment and if at all it amounts to an encroachment by the laintiff in his own land to which he is perfectly ntitled . There is no legal prohibition to bring such land under plough.

3. Cause of action :- Cause of action for this suit accrued on 14-8-1948 when the plaintiff was intimated that his appeal against the notice of the Mamlatdar was summerily dismissed and when he came to know that the Collector of Bijapur held that the plaintiff had made an encroachment on the Government land on 14-8-1948 and also on the date subsequently when the Mamlatdar ordered the plaintiff to remove the alleged encroachment.

4. Valuation :- A-s the suit is fora declaration that the plaintiff has not made any encroachment and for an injunction restraining the defendant from removing the alleged encroachment it is valued at Rs. 205/- and the Court fee is paid on that amount . For jurisdiction and for pleader's fees the valuation is the same.

5. Jurisdiction :- As the cause of action arose in the jurisdiction of this Court and as the plaintiff and the defendant reside in the jurisdiction of this Court, this Court has jurisdiction to try this suit.

6. The notice dated 22.2.1949 under Sec. 80 of the Civil Procedure Code of filing the suit is served on the Government on 23-2-1949.

7. The plaintiff prays:-

i. that it be declared that the order of the Revenue authorities directing the plaintiff to remove the alleged encroachment is ultra vires and void.

ii. that an injunction be issued to the defendant restraining the defendant from removing the alleged encroachment as mentioned in para 1 and 2 of the plaint ; and

iii. that the costs of the suit be awarded .

This suit coming for final disposal before Shri M.H.Kazi Civil Judge,Sr,Dn, Bijapur,in the presence of Shri L.H.Joshi pleader for the plaintiff and Shri A.C.Angadi pleader for the defendant this 15th day of october 1953 who decreed as below.

Decree.

It is ~~xxxx~~ declared that the notice issued by the learned Mamlatdar against the plaintiff under section 202 of the Land Revenue Code is not proper and legal.

The defendant is restrained from ordering the plaintiff to remove the encroachments,mentioned in paras 1 and~~2~~ 2 of the plaint.The defendant may take the proper and necessary steps against the plaintiff~~x~~ under section 48 or sec.61 of the Land Revenue Code for levying assessment etc,for the partition found to have been encroached by the plaintiff,after getting the Nala-bed measured as per Ex.73.

The parties do bear their own costs.

Bill of costs.

For plaintiff.		For defendant.	
1.Stamps for plaint.	15-10-0	1.R Applications Exhs,6,7,8, 9,10,11,12,13,14,15,16,17, 18,19,20,21,22,28,45,50,52, 58,60, ----------	14-7-0.
2. do for vakalatnama	0-10-0	2.Pleaders fee	18-12-0.
3.Applications,Exhs, 4-31,35,36,40,41, 47,56,62,65,67,69, and 88.----------	8-2-0.	3.Wittness bhatta	100-2-0.
4.Pleaders fee..	18-12-0	Total	133-5-0.
5. Process fee.	2-0-0.	Costs disallowed on application Exhs,6,7,8,9,10,11,22,13,14,15,16, 17,18,19,20,21,22,28,45,50,52, 58,60, ...	14-7-0.
6. C opying fee and stamps.	8-9-0.	Total	118-14-0.
Total	53-11-0		
Costs disallowed on Exhs,4-31,35,36, 40,41,47,56,62, 65,67,69,88,	8-2-0		
Total	45-9-0.		

6666

Given under my hand and the seal of the Court this day the 15th of October 1953.

Clerk. Sel ...

M.H. Kazi
Civil Judge,Sr,Dn,
Bijapur.

Pleader for plff. Shri L.H. Joshi

Pleader for deft, Shri A.G. Angadi
D4P

Sol.(M)

The plff was the owner of Survey No 84 of the village Yekundi , District Bijapur. The area of the land was 7 acres 19 Gunthas. Out of that area a portion of one acre and 2 Gunthas consists of Pot Kharaba land (waste land) partly occupied by a passage running near the Northern boundary of the field, and partly by the bed of a stream running from East to West on the Northern side of the same field. It seems that in 1937 the plffs father had erected an embankment near the Northern boundary of the field which had the effect of diverting the course of the stream.The neighbouring owners were affected by the change of the course of the water-flow. On their complaint the plffs father was asked to remove the embankment and he was also fined for the unauthorised encroachment on the bed of the stream. It seems that the embankment was washed away soon thereafter.

In 1943 the plff again tried to erect asimilar embankment. He also brought under cultivation a portion of the bed of the stream passing through his land. On the complaint of the neighbours a survey was made by the Circle Inspector after due notice to both the parties It was found that the plff had brought under cultivation a portion of the bed of the stream although according to the Land Revenue Code the plff had no right to do so without the permission of the Collector. The Circle Inspector prepared a plan showing the unauthorised encroachment. The Revenue authorities then asked the plff to stop the cultivation of the bed of the stream, and also to remove the embankment and the pavement constructed by him. On his failure to do so the Mamlat-dar issued a Notice to the plff under Sect 202 Land Revenue Code. The plff then filed the present suit for a declaration that the Mamlatdar's order was illegal and void.

The Govt contended that according to the

provisions of Rule 75, Land Revenue Rules, the Pot Kharaba land was uncultivable without the Collectors permission as it formed part of the bed of a stream in part, and also constituted a public passage in part '. The plff had erected an embankment and made a pavement in his land which had the effect of diverting the course of the stream . The width of the stream was considerrably narrowed near the plffs field. The Mamlatdars order was therefore justified.

The Court held that the inquiry as regards the encroachment had not been completed, and that it was not proved that the portion newly cultivated by the plff was part of the bed of a stream. The Court also held that the plff had a right to cultivate any portion of his land, and all that the Collector could do was to levy assessment on that part. The Court therefore held that the Mamlatdars order was illegal and directed that it may not be executed till a proper survey was made.

The District Govt Pleader has strongly urged that this is a proper case for filing an appeal in the District Court as the decision of the trial Court was clearly wrong. He has also forwarded the suggested grounds of appeal. The Collector agrees with the D.G.P.

The Plan drawan by the Circle Inspector in 1943, and again in 1946, after making a Survey in the presence of both parties will clearly show that the plff had brought under cultivation a portion of the bed of the stream, and had also erected a sort of embankment, and made a pavement on the Northern side of his field which had the effect of narrowing down the width of the stream to a considerable extent . No further inquiry was necessary in the matter. The Circle Inspector had issued Notices to both the parties to be present before he made the survey . The plff asked for a new survey, but did not pay the charges for the same . The Mamlatdar therefore held that the plan drawn by the circle Inspector was correct and it showed the encroachments made by the plff . Under Rule 75 of the Land Revenue Rules Pot Kharaba lands are divided into 2 classes. The first Class consists of lands occupied by farm houses and threshing Floors at at the time of the Survey. The second class comprises land occupied by public passages , or by a bank, or by a stream . The land in Class one may be brought under cultivation, but the cultivation of land in class two is strictly prohibited under Sect 48(4) of the Land Revenue Code. The trial Court noted that this was the law, but went on to say that it was not proved that the cultivated portion was part of the bed of the stream. This was clearly established from the plan drawn by the Circle Inspector, and this point was not raised by the plff in the plaint .

The view taken by the Court that the cultivated portion was not proved to be

part of the bed of the stream is obviously untenable, and this was also not the plffs case in the plaint.

The finding of the Court that the inquiry was not completed is based on a misconception. It seems that the plff filed this suit before his appeal pending before the Commissioner had been decided. The Commissioner had called for certain information from the Mamlatdar during the pendency of the appeal, and the Mamlatdar supllied the same. From this fact the Court inferred that the inquiry was still incomplete. This is clearly wrong. For, in Revenue appeals it is permissible to the appellate authority to call for further information necessary for the proper disposal of the appeal.

The Govt may therefore accept the recommendation of the District Govt Pleader and request him to file an appeal in the District Court Bijapur against the decision of the trial Court.

S.R.K.
16-11-53

R.L.A. 16/11

X 23050/E
17.XI.53. Secy. R.D. 17.11.53

REVENUE DEPARTMENT,
SECRETARIAT, BOMBAY.
17 NOV 1953

Received on: 12-11-1953. Registered on: 10-12-1953.

Decided on: 28-2-1955. Duration: 1 year 3 months and 10 days

IN THE DISTRICT COURT OF BIJAPUR,

AT BIJAPUR.

Civil Appeal No.327 of 1953 from

Decree in Civil Suit No.224 of 49

of the Court of the Civil Judge -

Senior Division of Bijapur(Shri M.M.Kazi).

Shri J.R.Desai. 1. The Bombay State. ... ... Appellant. (Original-Defendant).

-against-

Shri L.M.Joshi. 1. Gurappa Shivappa Koppad,

of Yakkundi in Bijapur Taluka.

Claim-D.

Grounds of Appeal.

(1) The finding of the lower Court on issue No.7 is erroneous and the lower Court ought to have held that the order of the Mamlatdar in question is intra-vires and a legal.

(2) The lower Court ought to have held that the bed of the Nala was as shown in red in the sketch Ex.7 that the Pot Kharab is of the class described in Rul 75(1) (b) of the Land Revenue Rules, that its cul

vation by the Plaintiff has been prohibited and that in view of sections 48, 61 and 121 of the Land Revenue Code the orders of the Revenue authorities and notices Exs. 71 and 72 issued under section 202 of the Land Revenue Code are perfectly legal and proper.

(3) The lower Court has not correctly taken into consideration what exactly the Plaintiff was called upon to do by the notices Exs. 71 and 72.

(4) The notice Ex.71 clearly mentions the area called upon to be vacated, and the notice Ex.72 also is clear on the point. The lower Court erred in not taking into consideration correctly what the area called upon to be vacated was.

(5) The lower Court erred in not taking into consideration the fact that the notices issued were according to the first part of section 202 of the Land Revenue Code and further proceedings of removal of the person refusing to vacate are subject to inquiry under the third part of that section.

(6) The observations of the lower Court about Plaintiff and his father not having changed the course of the Nala and about the pavement and about putting of the embankment are erroneous.

(7) The lower Court erred in holding that the Defendant did not prove that the red portion inEx.77 fell within the area of the Pot Kharab of the Nala.

(8) The lower Court's observation that it is not known at whose costs the land was measured in the year 1946 is erroneous.

(9) The observations of the lower Court about the village officers are erroneous.

(10) The Plaintiff had preferred an appeal to the Commissioner and it was in this proceeding that on being called upon by the higher authorities information contained in Ex.74 was supplied. Pending decision of the appeal forwarded to the Bombay Revenue Tribunal, the Plaintiff filed the suit and this point would have been made clear if the same were to have been asked to the Defendant's pleader.

(11) The lower Court erred in holding from the condition of the Nala that it could hardly flow throughout the rainy season and that notice was issued without ascertaining the nature of the Pot Kharab and that information began to be collected to meet the Plaintiff's case in the suit.

(12) The lower Court has not put correct interpretation as to what the Plaintiff was called upon to do by the notices (Exs. 71 and 72).

(13) The lower Court erred in not holding that the Nala bed had been correctly ascertained by measurement and in the presence of the parties had been shown in red in Ex.77.

(14) The decision and the Ruling relied upon by the lower Court do not apply to the facts of the case.

(15) The lower Court ought to have held that the Nala bed shown in red in the sketch Ex.77 is of class (b) Pot Kharab and is such as is referred to in Rule 75(1)b of the Land Revenue Rules.

(16) The lower Court ought to have disbelieved the Plaintiff and ought to have accepted the evidence of the Defendant's witness Ex.91 and the other evidence adduced on behalf of the Defendant.

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(17) The lower Court ought to have held from the village map produced by the Plaintiff and the sketch with the plaint and other evidence in the suit that the original Nala bed was as shown in red in Ex.77, that it is pxx pot Kharab of class (b) under Rule 75(1)(b) of the Land Revenue Rules, that the Plaintiff who admittedly brought it under cultivation has been in unauthorised occupation ofthe same and has been using it for prohibited purpose and that therefore the notice issued by the Mamlatdar were legal and proper.

(18) The notes of Inspection are made by inspecting the changed bed ofthe Nala as is now existing and the inferences of the lower Court drawn by it thereon against the case of the Defendant are x erroneous.

(19) The notice under section 202 was issued on 23-3-1948 and therefore the lower Court ought to have held the suit to be barred by time.

(20) The findings of the lower Court on issues Nos. 3 to 6 are erroneous.

(21) The Judgment and Decree of the lower Court are contrary to law and evidence in the case.

J U D G M E N T.

This is an appeal by the Defendant from the Judgment and Decree, dated 15-10-1953, passed by the Civil Judge, Senixx Senior Division, Bijapur, in civil suit No.224 of 1949.

2. The Plaintiff had instituted the suit for a declaration that the order of the Revenue authorities directing him to remove the alleged encroachment was ux ultra vires and void and for a permanent injunction restraining the Defendant from removing the alleged-

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encoachment, alleging that he was the owner of Survey No.84 of Yakkundi, measuring 7 acres 19 gunthas and assessed at Rs. 3/-. He further alleged that a nullah flowed on the northern boundary of survey No.83 and passed through Survey Nos. 85, 86 and 87. A portion of the land where the nullah flowed was shown as waste in the Record of Rights. Another water-course joined this nullah in the Plaintiff's land. The Plaintiff's father Shivappa, with a view to prevent the soil of the land being washed away by the said water-course, -- constructed about 75 years ago a pavement by collecting stones at the point where the said water-course joined the nullah in his land without changing the original course of the nullah and without touching the long-standing northern bund of his land. In 1943 one Hanmantapp owner of Survey No.64, moved the Mamlatdar of Bijapur alleging that the Plaintiff's father had changed the course of the nullah and had encroached upon Government land. The Mamlatdar forwarded the application to the Circle Inspector for enquiry and report. The Circle Inspector, in collusion with Hanmantappa and the village Patil who was on inimical terms with the Plaintiff, got a false and one sided report made. Thereafter the matter dragged on for several years, and the Plaintiff thought that the proceedings had been filed by the authorities as not worth proceeding. But the Mamlatdar of Bijapur Land Revenue Code asking the Plaintiff to remove the encroachment. The Plaintiff received the notice on 16-4-1948. The Plaintiff preferred an appeal against the said notice to the Collector of Bijapur, but it was summarily dismissed and the intimation thereof was received by him on 14-8-1948. The Plaintiff had not made any encroachment. His father was justified and was within his rights in constructing the pavement without changing the course of the nullah and without-

causing any damage to the neighbouring land-owners, to preserve the soil of the land. The defendant owned no land nearby or in the bed of the nullah which fell entirely in the land of the Plaintiff. The Plaintiff was the full owner of the bed of the nullah. If by construction of the pavement some portion of the nullah-bed was brought under cultivation, it did not amount to encroachment. There was no legal prohibition to bring the land under cultivation. The cause of action for the suit arose on 14-2-1948 when the Plaintiff received the intimation about the dismissal of his appeal.

3. The Bombay State, which is the Defendant, entered appearance through the District Government Pleader, and disputed by its written statement (Ex.23) that the Plaintiff was the owner of the entire Survey No.84. It denied the allegation regarding the course of the nullah as mentioned by the Plaintiff as well as the allegation that another water-course joined the nullah in the plaintiff's land. According to it, the nullah in question was one and the same and was of Government ownership. It flowed through-out the year. It denied the construction of the pavement 75 years ago, and the collusion between the Circle Inspector and the Village patil. It further denied that the Plaintiff was entitled to bring under cultivation the bed of the nullah, and contended that the notice under section 80 C.P.C. given by the Plaintiff was not legal and proper. It asserted that the orders passed by the Revenue authorities directing the Plaintiff to remove the encorachment were perfectly legal and valid and not ultra vires and void as alleged by the Plaintiff. It pleaded the bar of limitation under Article 14 of Schedule I to the Indian Limitation Act. It pointed out that even if it to be assumed that some portion of the bed of the

nullah fell in the Pot Kharab of Survey No.84; still the Plaintiff was not entitled to irrigate the bed or construct pavement and change the course of the nullah so as to bring the dried up bed under cultigation. It was still an encroachment. The Mamlatdar, with the previous sanction of the District Deputy Collector, was justified in issuing an order for removal of the encroachment under section 48(4) and section 61 of the Bombay Land Revenue Code read with rule 75 of the Land Revenue Rules. The alleged Pot-Kharab of Survey No.84 classified as 'B' in the Government Records consisted of road and stream used by persons other than the holder of Survey No.84 for irrigation and other purposes. The Plaintiff was legally prohibited from cultivating the Pot-Kharab and the area covered by the road and stream or nullah or from changing the course of the nullah so as to bring the bed under cultivation. The order of the Revenue Officer was, therefore, legal and valid.

4. On the above pleadings, several issues were raised at Ex.25, and the learned Judge below held that the notice given by the Plaintiff to the Defendant under section 80 of the Code of Civil Procedure was legal and proper, that the Plaintiff was the owner of the entire Survey No.84 measuring 7 acres 19 gunthas, that the Plaintiff was the owner of the bed of the nullah in dispute, that by reason of the pavement and bund erected by the Plaintiff's father the course of the nullah was not changed, that the Mamlatdar's order was illegal and ultra vires, and that the suit was in time, and eventually decreed the suit in favour of the Plaintiff.

5. Dis-satisfied with this result of the suit,

the Defendant has comein appeal, and the following points arise for determination :-

(1) Whether tPlaintiff is the owner of the entire Survey No.84 of Yakkundi ?

(2) Whether he is the owner of the bed of the nullah in dispute ?

(3) Whether by reason of the pavement and bund erected by the Plaintiff's father the course of then nullah had changed?

(4) Whether theMamlatdar's order is illegal and ultra vires ?

(5) Whether the suit is barred by limitation ?

6. My findings are:-

(1) Yes.

(2) Yes.

(3) No.

(4) Yes.

(5) No.

R E A S O N S.

7. The Plaintiff is admittedly the owner of -- Survey No.84 of Yakkundi. It measures 7 acres 19 gunthas, including Pot-Kharab of 1 acre 2 gunthas, and is assessed at Rs.3/- (vide the Record of Rights extract Ex.79). The Pot-Kharab of 1 acre 2 gunthas is inclusive of 14 gunthas covered by the nullah, 11 gunthas by foot-path, and 17-gunthas waste (vide extract from Prati Book of 1885 - produced along with Ex.73). The situation of thenullah and the lands through which it passed in 1886 when the Survey Map of Yakkundi village was prepared, can be - seen from the Village Map (Ex.92). Ex. 92 shows that the nullah in question flowed from east to west and ultimately joined the river Krishna. It further shows that the - nullah flowed into Survey No.84 at some distance from

the northern boundary to the south. There is, however, a change in the present situation. On 4-6-1943 the Circle Inspector drew a sketche of the existing condition of the nullah at the instance of the Mamlatdar and that sketch is at Ex.76, from which it can be seen that the nullah flows along the northern boundary of Survey Nos. 84 and 85. In Survey No.85 the width ofthe nullah is shown as 54 feet, while in Survey No.84 its width is shown as 13 feet. On 16-2-1946 a map showing the alleged encroachment and the diversion of the nullah was drawn up by the survey Department, and the same is at Ex.77. The existing condition of the nullah is marked in blue pencil and its condition, according to the village map, is marked in red pencil. Ex.77 also shows that the nullah h now flows along the h northern boundary of Survey Nos. 84 and 85. The Defendant's contention seems to be that as the result of the embankment put by up by the Plaintiff along the line marked by the Roman figures, I, II, III, IV, V, and VI in Ex.77, the flow of the nullah has been diverted. But that is improbable. The Defendant's contention further seems to be that after diverting the course of the nullah, the Plaintiff brought the bed of the nullah under cultivation and thus committed an encroachment. The Defendant's witness Bhimani Gundo Kul'arni (Ex.91) admits in his cross-examination that he cannot say how there has been a change in the course of the nullah. The learned trial Judge who inspected the disputed sites, has drawn up his Inspection Notes at Ex.92-A. The impression formed by him after inspecting the sites are couched in these words in para 10 of his Judgment :

> "I inspected the suit site and drew my own notes at Ex.92-A. I found that the suit nullah was flowing between two hill-like dams or sloping fields. In a word, it can be said that

the suit nullah is a valley between two highly situated fields. The white portion, noted in the sketch (Ex.77) between blue portion and the red portion is nothing but a sloping hill, covered with bushes, trees, bamboos etc. There are two old babul trees also growing on that sloping portion. I do not think that the water of the suit nullah would rise even up to half the height of both the dams of the neighbouring lands S.Nos. 64 and 84. I think that thousands of rupees will be required to remove the earth trees, bushes etc., from the white and the red portions and bring the said area to the level of the blue portion if the notice Ex.72 meant it. If the Mamlatdar had visited the suit - properties, he too could have certainly come to know that it was not possible to remove the earth from the red portion and bring it to the level ofthe nullah.It also looked impossible that the Plaintiff could have turned the white and red portions into a sloping hill and the field respectively by putting an embankment or dam along the line IV, V, VI and change the - water-course towards the points M N at Ex.77, unless the owners of the eastern lands (S.No. 82)etc.) also changed the course of the nullah successfully at the great distance from S.No.84, towards the east. "(Sic).

Then in para 11, the learned Judge below goes on to say:-

"Before visiting the site, I was under the - impression that the Plaintiff might have encroached the portion of the nullah bed itself, by putting the embankment etc. But, after - visiting the site, I found that the Plaintiff could not have changed the course of the suit

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nullah by putting embankments, in view of the situation of the nullah and the land, which are situated on both the sides of the nullah, to the east of the S.No.84 and 64."(Sic)

Then in para 12, he says:-

"It is true that the Plaintiff has put some ~~xxx~~ stones and planted some shrubs by way of pavement, at the western end of his land, - close to thenullah in suit. But the said pavement too, could not have diverted the course of the nullah, as it flows from east to west by a particular route and as the land of the Plaintiff near that pavement slopes down from the south to the north. It is possible that the Plaintiff put the said pavement of the stones and bushes to prevent the flow of the - earth of his land into the suit nullah, by - another small brook let flowing from south to north as per allegations of the Plaintiff."(Sic)

From the above observations of the learned Judge below who visited the suit sites, it is abundantly clear that encroachment by the Plaintiff of all the bed of the - nullah over-night is an impossibility. The change in the course of the nullah since 1886 appears n to have been gradual and imperceptible. As observed by the - lower Court, it was not possible for the Plaintiff or his father to spend a large sum of money on the construction of the embankment for encroaching a small strip of land marked in red pencil in the map ex.77. Moreover it looks un-natural and improbable that the Plaintiff's father would spend his money and labour to put up an - embankment on the bed of the nullah itself, when the water flowed over it, without minding the possible or probable destruction of it by the flood of the nullah during the rainy season. In short, according to the -

lower Court, neither the Plaintiff nor his father has committed any encroachment upon the bed of the nullah as alleged by the Defendant, and I entirely agree with that view of the lower Court.

8. The present notice under section 202 of the Bombay Land Revenue Code had its origin in an application (Ex.78), dated 20-3-1943, filed by one Hanmantappa Jivannappa Joshi requesting the Mamlatdar of Bijapur to restrain the present Plaintiff's father Shivappa Mallappa Koppad alias Kaggod from constructing an east-west embankment in the nullah in Survey No.84. He himself was the co-owner of Survey No.64 which lies to the immediate north of Survey No.84. The Mamlatdar forwarded the application the Circle Inspector of Bableshwar for report with a clear sketch (vide endorsement, dated 19-5-1943, below Ex.78). On 27-5-1943 the Circle Inspector recorded the statement of the Plaintiff's father Shivappa at Ex.80. In that statement Shivappa stated that he had put up the embankment in his own land along the Bandh, that the width of the nullah at that place had been 13 feet since long and that he had not committed encroachment in the Government nullah by putting up the embankment. On 13-11-1943 the Circule Inspector made a report stating that a notice under section 202 of the Land Revenue Code should be issued to the Plaintiff's father and that he should be directed to remove the encroachment as done previously in the year 1937-38 by the then Mamlatdar (vide Ex.81). Before he submitted the above report to the Mamlatdar he seems to have drawn a sketch (Ex.76) of the existing condition of the nullah and the embankment on 4-6-1943. In the explanatory notes in Ex.76, it has been mentioned by him that out of 54 feet, encroachment to the extent of 41 feet was committed by the Plaintiff's father leaving the nullah with a width of

13 feet only. As I have said above, it was not possible for the Plaintiff or his father to change the course of the the nullah, nor was it possible for him to shorten the width of the nullah by putting up the embankment.

9. It is sometimes contended by the District Government Pleader appearing for the State that the portion marked in red in the map (Ex.77) is the bed of the nullah and belongs to Government, that the Pot-Kharab is ofthe class described in rule 75(1)(b) of the Land Revenue Rules, that its cultivation bythe Plaintiff has been prohibited and that in view of sections 48, 61 and 121 of the Land Revenue Code, the orders of the Revenue Authorities and the notices (Exs. 71 and 72) issued under section 202 of the Land Revenue Code are perfectly legal and proper. In the first place, it is to be noted that neither the Plaintiff nor his father has committed any encroachment in the bed of the nullah. As I have observed above, the Pot-Kharab of 1 acre and 2 gunthas in Survey No.84 is inclusive of 14 gunthas of Pot- Kharab reserved for the nullah. The Defendant has not shown that the nullah as it exists in Survey No.84 measures less than 14 gunthas. The waste portion was 17 gunthas and probably the Plaintiff or his father might have brought that waste portion under cultivation.

10. Assuming for a moment that the disputed portion which is alleged to have been brought under cultivation forms part of the bed of the nullah, it would be of the ownership of the Plaintiff and not of Government. Under section 37 of the Land Revenue Code, ' all roads --- the bed of -------streams, nalias, lakes ------and water-courses ------ which are not the property of individuals, or of aggregates of persons legally capable of holding property, and except in so far as any rights

of such persons may be established in or over the same, and except as may be otherwise provided in any law for the time being in force are and are hereby declared to be, with all rights in or over the same, or appertaining thereto, the property of Government -----". It will thus be seen that under section 37, the bed ofthe nullah - belongs to Government only when it is not proved to be of private ownership. In the present case, the - ownership of Government is evidently subject to the rights of owners legally existing. In the case of Vinayakrao Keshavrao v. The Secretary of State for Indian in Council (23 Bom39), the provisions of section 37 have been interpreted, and so also the - effect of title to lands has been interpreted. The -- dispute there was, among other things, about two plots of land which were part of the village granted in inam to the Inamdar. At the time when the village was - surveyed, those plots were not given survey numbers and the lower Court held that they had become part of the village site and belonged to the Government. It was - however held by the High Court that section 61 of the Bombay Land Revenue Code did not empower the Government to confiscate any land belonging to an Inamdar and to confer it on another person, and the mere omission to number a land could not convert it into a village site or take away any existing rights. Ranade J. observed at page 45 :-

> "If at a survey certain lands are not numbered of assessed by reason of their being Kharab, it does not follow that the ownership of such land is thereby injuriously affected or -- curtailed. Numbering or surveying do not by - themselves create or destroy rights."

On similar grounds it was held that the bed of a stream in the village also belonged to the Inamdar and that the

owners ofthe lands on both ~~it~~ sides were proprietors of the bed of the stream.

Parsons J. observed at page 44:-

> "----section 37 deals only with what is not the property of individuals, and can have no application to the bed of the rivulet which flows through the land of any individual, for it would be the property of that individual who owned the land upon its banks."

These observations of Ranade and Parsons JJ. were quoted with approval by Divitia J. in the case of Nawab Sardar Harharsingji Ishvarsingji v. The Secretary of State for Indian (43 Bom.L.R.167). In that case the dispute was about a river bed. There is also the decision of theRevenue Tribunal quoted by Gupte in his Treatise on the Bombay Land Revenue Code (1953 Edition, at page 279) which is to the following effect:

> "The holders' of Pot-Kharab did not fall under rule 75(1)(b); and where it appeared to be - common ground that the water in the nullah, if any, only existed during the rains and that the bed ofthe nullah fell within the Pot-Kharab of the holding of the appellant, the Tribunal held that the holder cannot be prohibited by the Collector from cultivating it by the - erection of a dam or otherwise in his own -- survey number."

It is apparent that that decision turned upon the interpretation of rule 75(1)(b) of the Bombay Land Revenue Rules. In the present case I should think that the - Pot-Kharab, which is inclusive of the nullah in dispute, does not at all fall within the class of the Pot-Kharab referred to in rule 75(1)(b). Rule 75 of the Bombay Land Revenue Rules says that land included as unarable --

(pot kharab) in survey number assessed for purposes of agriculture only is of two kinds:-

(a) that which is classed as unfit for agriculture at the time of survey including the farm buildings or threshing-floors of the holder ;

(b) that which is not assessed because it is -- reserved or assigned for public purposes; or because it is occupied by a road or recognised footpath; or by a tank or stream used by persons other than the holder for irrgt irrigation or for drinking or domestic -- purposes, or used for a burial or burning ground by any community, or by the public; or because it is - assigned for village potteries.

Sub-rule (2) of rule 75 says that class (a) may be - brought under cultivation at any time by the holder and no additional assessmentshall be charged therefor, and the cultivation of class (b) is prohibited under section 48, sub-section (4) of the Bombay Land Revenue Code. The question is whether in the present case the Pot-Kharab of 1 acre 2 gunthas falls within the class (b). The extract from the Record of Rights (Ex.79) shows that the Pot-Kharab of 1 acre 2 gunthas in survey No.84 is not separately assessed, but the entire land measuring 7 acres 19 gunthas, inclusive of the Pot-Kharab of 1 - acres 2 gunthas, is assessed at Rs. 3. There is nothing in Ex.79 from which it can be gathered that the Pot-Kharab of 1 acres 2 gunthas or any portion of it is reserved or assigned for public purposes. If it were so reserved or assigned, the same would have been mentioned in the column of other rights in the Record of Rights. The evidence on the record establishes that persons other than the owner of survey No.84 do not use the - water of the nullah for irrigation or for drinking or -

domestic purposes. It further establishes that the water flows only during the monsoon. Even Bhimaji Gundo Kulkarni (Ex.91), who is not on good terms with the Plaintiff, admits in his evidence-in-chief that the nullah dries up for a month or two only. He further admits that the villagers do not use the nullah for the purpose of drinking water. Under the circumstances, with no stretch of imagination could it be said that 1 acres 2 gunthas of Pot-Kharab or any portionof it in Survey No.84 falls within the class described in rule 75 (1)(b) of the Bombay Land Revenue Rules.

In Anderson's Manual there are very useful rules regarding the manner in which the details of different kinds of lands set apart for special and public purposes are to be noted. In paragraph 15 at page 24 of Anderson's Manual, 1951 Edition, it is stated that thedetails of different kinds of land set apart for special and Public purposes are not required for any subsequent accounts except only the area of 'Forest'. But it is always possible that G or C might want to know what was the total area in the Taluka assigned for some particular purpose such as burial grounds, playgrounds for schools, or anything of that sort. In order that K should at once show all the purposes and all the areas to assigned in the village, it is useful once for all to write out the details in the abstract. The model abstract is to be found at page 21. It will be seen from that abstract that the Pot-Kharab assigned for roads, water-courses etc. will have to be mentioned in the manner stated therein under the heading"assigned for public and special uses". -- No such abstract is forthcoming for the obvious reason that the Pot-Kharab of 1 acres 2 gunthas in Survey No. 84 is not assigned for any public or special use. On the

whole, I am convinced that the Pot-Kharab of 1 acres 2 gunthas in survey No.84 does not fall within the class specified in rule 75(1)(b) and therefore the cultivation of the same or any portion of it is not prohibited under section 48, sub-section (4), of the Bombay Land Revenue Code.

11. From the above discussion, it will be seen that the entry of the Plaintiff upon the disputed land and the cultivation of the same do not attract the penal provisions of either section 61 or 121 of the Bombay Land Revenue Code. It then follows that the notice issued by the Mamlatdar under section 202 calling upon the Plaintiff to remove the encroachment is illegal and without jurisdiction. In fact the Plaintiff's possession of the disputed land is not wrongful or unauthorised. It is of his ownership. It does not constitute the bed of the Nullah. Even if it be assumed that it forms part of the bed of the nullah, still it is of the ownership of the Plaintiff. It is apparent that without ascertaining the extent and the nature of the Pot-Kharab, the Mamlatdar has issued the notice under section 202. The notice is at Exs. 71 and 72. It is vague and indefinite. It does not mention which part of the bed of the nullah has been encroached upon and what is the nature of the encroachment. It does not also mention the extent of the encroachment. The learned District Government Pleader, however, argues that the notice contemplates that the encroached portion could not be brought under cultivation. But that argument makes little appeal to my mind as no such words appear in the notice. The notice says that the Plaintiff should give up the land within 7 days of the receipt of the notice. While giving the description of the land below, it is stated ' on the bed of the nullah near-

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Survey No.84'. This description does not lend any - support to the argument advanced by the learned District Government Pleader.

12. In the result, therefore, I agree with the finding of the lower Court that the Plaintiff is the owner of the entire Survey No.84, including the Pot-Kharab of 1 acre 2 gunthas, that he is the owner of the bed of the nullah in dispute, that by reason ofthe - pavement and the embankment erected by the Plaintiff's father the course of the nullah is not changed, and that the Mamlatdar's order under section 202 of the Land Revenue Code is illegal and ultravires.

13. The contention regarding limitation bears very little discussion. On 23-3-1948 the Mamlatdar passed an order below Ex.71 directing the notice under section 202 of the Bombay Land Revenue Code to be issued to the Plaintiff as an encroacher. The notice was actually served on the Plaintiff on 16-4-1948. The Plaintiff preferred an appeal against it to the Collector, but the appeal was summarily dismissed on 23-7-1948 (vide Ex.72). The result of thesame was intimated to the Plaintiff on 12-9-1948. The suit was, however, filed on 30-5-1949. It is thus clear that the suit does not attract the bar of limitation under Article 14 of the Indian Limitation Act. Even if it be assumed that the limitation starts on 16-4-1948, one year's period will be over on 16-4-1949 But on that day the Bijapur Court was closed for summar vacation and it re-opened on 30-5-1949. The suit was filed on 30-5-1949, and therefore, it is clearly in time.

14. In the result, the appeal fails and must be - dismissed.

ORDER.

15. The appeal is dismissed with costs.

28th February,1955. Sd/- N.S.Metrani.

District Judge.

(17405) Bijapur C.S.No. 224/49 355

S.P.K.—(J) J 2-10,000-4-54
G.O., L.D., No. 1193, dated 7-12-15

[Govt. Pl. H.C. Bom.—Spl. Form No. 2 e

No. 8180.

35/109

From

THE GOVERNMENT PLEADER, HIGH COURT, BOMBAY;

To

THE SECRETARY TO GOVERNMENT, LEGAL DEPARTMENT, BOMBAY

~~THE PUBLIC PROSECUTOR, BOMBAY;~~

~~THE DISTRICT MAGISTRATE OF~~
THE COLLECTOR OF

Bombay.....9th September.....195 5.

SIR,

Referring to.....this office letter..... No.....~~5272~~ 5270.....

dated.....16th June.....1955, , I have the honour to inform you that the Case noted in the margin was heard by the High Court on 6-9-1955, when the following Order was passed:—

Second Appeal No. 836/55.
The State of Bombay.
V/s.
Gurappa Shivappa Koppad.

"Dismissed." (At the time of admission.)

Yours faithfully,

for Government Pleader, High Court.

THE SECRETARY TO GOVT. OF BOMBAY
LEGAL DEPARTMENT.
File No. 26640
Branch No. E
Month 12/9/55

354.

29/10 Mr. Wyatt & Mr. C. of the
is a fit case for Appeal
Mr. N. & Mr. Mc Lobb
Mr
12-9

~~355~~ 364 189

No. 20226/E

Office of the
Remembrancer of Legal Affairs,
Sachivalaya, Bombay, 14th September 1955.

To

The Government Pleader,
High Court,
Bombay.

Sub: Second Appeal No.836/55.
The State of Bombay
V/s.
Gurappa Shivappa Koppad.

Sir,

With reference to your letter No.8180 dated the 9th September 1955 on the above subject, I have the honour to invite your attention to Rule 142 of the Law Officers' Rules and to request you to state whether this is a fit case for Letters Patent Appeal.

Yours faithfully,

for Remembrancer of Legal Affairs.

Nair/-

~~111 357/365~~

No. 8398

Office of the
Government Pleader, High Court,
Bombay, 15th September 1955.

From

Shri H.M.Choksi, B.A.(Hons.)LL.B.,
Government Pleader, High Court.

To

The Remamberancer of Legal Affairs,
Bombay.

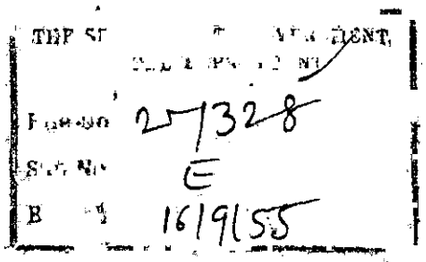
Subject: Second Appeal No. 836/55.
The State of Bombay.
V/s.
Gurappa Shivappa Koppad.

Sir,

With reference to your letter No. 20226/E dated 14th September 1955 on the above subject, I have the honour to state that this is not a fit case for filing Letters Patent Appeal.

"Both the courts on evidence have recorded a ~~common~~ finding of facts that the plaintiff has made no. -- encroachment and has not changed the ~~courts~~ of the Nalabed. They have also come to the ~~xi~~ conclusion that the evidence on record does not established that the plaintiff has brought under cultivation any area which he was not entitled to bring under cultivation.

The conclusion that the area of the pot khababa in the present case is not of the class mentioned in Rule 75(1)(b); also appears to be correct. Since the material points ~~on~~ are questions of fact the High Court ~~cannot~~ could not be pursuaded to admit the Second Appeal. No Letters Patent Appeal can be advised in the matter."



Yours faithfully,

V. S. Desai

for Government Pleader, High Court.

Sirkiella

Nil G. R. Hist sheets
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No.2216. Rs.As.Ps.(Fs.1) Typed by Mr.P.J.Vyas.

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S. Mulherkar
Superintendent,D.D.,
-9-1955.

3.67 113

by applied for on 13/9/55 26
by ready on 26/9/55
by delivered on 19-10-55

Regd. Post on

Assistant Superintendent 19/10

In the High Court of Judicature at Bombay.

Order passed by the High Court in the case of:-

The State of Bombay. (Orig.Defendant) ... Appellant.

Versus.

Guruppa Shivappa Koppad. (Orig.Plaintiff)..Respondent.

Being Second Appeal No.836 of 1955.

The Government Pleader for the appellant(The State of Bomba

HIGH COURT APPELLATE SIDE CERTIFIED COPY BOMBAY

Coram:- Bavdekar, J.

Dismissed.

The 6th day of September 1955.

....

True Copy.

for Deputy Registrar.

The 26th day of September 1955.